TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 285.

THE UNITED STATES, APPELLANT,

vs.

THE STATE OF NEW YORK.

FILED AUGUST 31, 1891.

No. 422.

THE STATE OF NEW YORK, APPELLANT,

vs.

THE UNITED STATES.

FILED JULY 15, 1892.

APPEALS FROM THE COURT OF CLAIMS.

(14831 and 15083.)

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1 In the Court of Claims.

THE STATE OF NEW YORK
vs.
THE UNITED STATES. } No. 16430.

I. *Communication of Secretary of Treasury, transmitting claim under section 1063 of the Revised Statutes, dated January 3, 1889, and filed January 9, 1889.*

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., January 3, 1889.

To the honorable the Chief Justice and Judges of the Court of Claims:

I have the honor to transmit herewith the papers pertaining to the claim of the State of New York now pending in this Department for interest paid or money borrowed and expended in enrolling, subsisting, etc., its troops employed in aiding to suppress the rebellion of 1861, which said claim involves controverted questions of law, and the amount in controversy exceeds three thousand dollars.

This case is transmitted to your honorable court under and by authority of section 1063 of the Revised Statutes of the United States, to be there proceeded in according to law.

Respectfully, yours,

C. S. FAIRCHILD,
Secretary.

2 II. *Petition filed February 7, 1889.*

To the honorable the Court of Claims of the United States:

The petition of the State of New York, by John G. Farnsworth, its attorney-in-fact, respectfully showeth unto the honorable court that the State of New York is the owner of the claim hereinafter mentioned and described, and the only person interested therein; that its ownership of said claim is original; that no assignment or transfer of said claim, or any part thereof, or interest therein, has been made to any person whatsoever; that the said claimant, the State of New York, is justly entitled to the amounts hereinafter claimed, as stated, from the United States, after allowing all just credits and off-sets; that the said claimant, the State of New York, has at all times borne true allegiance to the Government of

3 the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the said Government of the United States; that said petitioner verily believes the facts as stated in this petition to be true.

Said petitioner further showeth, upon information and belief, as follows:

The United States became and was indebted to the State of New York on or about the first day of July, 1862, for moneys paid, laid out, and expended by the said State of New York to and for the use of the said United States, upon the request of the said United States, and upon its promise to repay the same to the State of New York, in the sum of $3,131,188.02, which sum was then and there payable; of which sum the

said United States has repaid to the State of New York the sum of $3,000,000, and is still indebted to the said State of New York for the balance of such sum, to wit, $131,188.02.

That the facts relative to the indebtedness of the United States to the State of New York, as aforesaid, are as follows, to wit:

That in the year 1861 a large number of persons rebelled against the Government of the United States, and levied war against such Government, and carried on such rebellion and war for several years thereafter, which war is known in history as the civil war, or the war of the rebellion; that at the outbreak of such rebellion the United States was without the requisite means in hand to maintain its authority and government against the said rebellious persons, and was grievously in need of troops and munitions of war and money for the purpose of maintaining its authority and defending its government; and that thereupon the
4 Government of the United States did make request upon certain of the States, among others the State of New York, to provide means, men, and money, and munitions of war to and for the use of the Government of the United States for the purposes of defense aforesaid. And the said State of New York thereupon did provide and render to the United States a large number of troops, and did equip the same with arms, clothing, and munitions of war, and did also render to the Government of the United States arms and munitions of war in addition to such as were required to be used by the said troops so enrolled by it, and said State of New York, in equipping said troops and in buying and furnishing the said arms and munitions of war to and for the use of the United States as aforesaid, did necessarily expend very large sums of money, to wit, the sum of $3,000,000; that the said State of New York had to borrow a very large part of said moneys, there then not being in the treasury of the State of New York sufficient funds available for the purposes aforesaid, and in order to raise such money the State of New York did borrow at various times, of various persons, upon bonds issued by it and otherwise, a large part of the said sum of $3,000,000 upon the promise of the said State to repay the said amount, with interest, to the persons from whom the same was borrowed, as aforesaid; that the promise and undertaking of the State of New York, so made as aforesaid, to pay interest upon the said loans so made by it was absolutely necessary and indispensable to enable the said State to procure said loans, and the said State of New York was compelled to pay, and did pay, to the persons from whom it borrowed the said moneys aforesaid divers large sums of money for interest at lawful rates, amounting in the aggregate to the sum of
5 $131,188.02, to wit, upon the following dates, the following amounts:

October 1, 1861	$26,279.17
January 1, 1862	21,875.00
April 1, 1862	21,875.00
April 4, 1862	39,867.18
June 1, 1862	1,166.67
July 1, 1862	20,125.00
	131,188.02

And your petitioner further respectfully showeth that by act of Congress passed July 27th, 1861, it was enacted as follows:

"That the Secretary of the Treasury be, and he is hereby, directed, out of any moneys in the Treasury not otherwise appropriated, to pay to the governor of any State, or its duly authorized agents, the costs, charges, and expenses properly incurred by said State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding in suppressing the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury."

And your petitioner further respectfully showeth, upon information and belief, as follows:

That a portion of the moneys so actually expended by the State of New York in raising, arming, equipping, and transporting said troops and in buying arms and munitions of war for the said United States has been repaid to the State of New York by the United States under the provisions of the act of Congress above set forth, but there still remains
6 unpaid a portion of the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting said troops as aforesaid, to wit, the amount paid by the said State of New York for interest, the sum of $131,188.02.

That immediately after the payment by the State of New York of said sum of $131,188.02, and within six years from such payment, a claim was presented therefor to the Secretary of the Treasury of the United States, and such proceedings were thereon had in the Treasury Department, and before the proper officer thereof, to wit, the Second Comptroller; that on or about the 23d day of December, 1869, the question of said claim for interest so paid by the State of New York as aforesaid against the United States was suspended, subject to future decision; and thereafter, and on or about the 7th day of June, 1882, the said claim and the question of the validity thereof was presented to the Attorney-General of the United States for his opinion, and said Attorney-General thereafter, and on or about the 23d day of July, 1883, rendered his opinion thereon, and the same was filed in the Treasury Department of the United States, which opinion is to the effect that said claim of the State of New York does not come within the provisions of the act of July 27th, 1861. Thereafter such proceedings were had in the Treasury Department in the matter of said claim; that, at the request of said claimant, by its attorney-in-fact, on or about the 3d day of January, 1889, the Secretary of the Treasury did, under the provisions of section 1063 of the Revised Statutes of the United States, transmit the said claim, with all the vouchers,
papers, proofs, and documents pertaining thereto, to the Court of
7 Claims, there to be proceeded in accordance to law; and hereto annexed and marked Exhibit A is a copy of said order of transmission.

Wherefore the said petitioner, the State of New York, by John G. Farnsworth, its attorney-in-fact, respectfully prays judgment and relief as follows, to wit: Award and payment from the United States to the said claimant, the State of New York, of the sum of $131,188.02, with interest

thereon from the first day of July, 1862. together with such other and further order and relief as may in the premises be warranted by and in conformity with law.

Dated February 2d, 1889.

JOHN G. FARNSWORTH,
For the State of New York.

UNITED STATES OF AMERICA:

John G. Farnsworth, being duly sworn, deposes and says that he is the attorney-in-fact of the State of New York, the claimant above named, and that he executed the foregoing petition in behalf of the said State; that he has read said petition, and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes the same to be true.

JOHN G. FARNSWORTH.

Sworn to before me this 2d day of February, 1889.

[SEAL.] JOHN J. O'NEILL,
Notary Public in and for Albany Co., N. Y.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, ss:

I, Robert H. Moore, clerk of the said city and county, and also
8 clerk of the supreme and county courts, being courts of record held therein, do hereby certify that John J. O'Neill, whose name is subscribed to the jurat of the annexed affidavit, was on the day of the date thereof a notary public in and for the county of Albany, dwelling in said county, duly authorized to administer oaths for general purposes, and that I am well acquainted with the handwriting of the said notary public, and verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed my official seal this 2d day of February, 1889.

[SEAL.] R. H. MOORE, *Clerk.*

UNITED STATES OF AMERICA, *State of New York:*

By FREDERICK COOK,
Secretary of State, and custodian of the great seal thereof:

It is hereby certified that Robert H. Moore was clerk of the county of Albany, in said State, and clerk of the supreme court therein, being a court of record, on the day of the date of the annexed certificate, and duly authorized to grant the same; that the same is in due form and executed by the proper officer; that the seal affixed to said certificate is the seal of said county and court; that the signature thereto of the said clerk is in his proper handwriting, and is genuine; and that full faith and credit may and ought to be given to his official acts.

In testimony whereof the great seal of the State is hereunto affixed.

Witness my hand at the city of Albany the 2d day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

[SEAL.] FREDERICK COOK,
Secretary of State.

9 III. *Traverse filed March* 25, 1889.

And now comes the Attorney-General on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

10 IV. *Findings of fact and conclusion of law, filed June* 8, 1891.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

Between the 22d day of April, 1861, and the 4th day of July, 1861, the State of New York, by its governor, Hon. Edwin D. Morgan, who was the commander in chief of its military forces, and by its other duly authorized officers and agents, enlisted, enrolled, armed, equipped, and caused to be mustered into the military service of the United States, to aid in the suppression of the war of the rebellion, thirty-eight regiments of troops for the period of two years, or during the war, and numbering in all thirty thousand men.

II.

Such troops were so enlisted, armed, equipped, and mustered into the service of the United States under and pursuant to the provisions of chapter 277 of the laws of the State of New York, passed April 15, 1861, and which act provided that all expenditures for arms, supplies, or equipments necessary for such forces should be made under the direction of the governor, lieutenant-governor, secretary of state, comptroller, State engineer and surveyor, and State treasurer, or a majority of them, and that the moneys therefor should, on the certificate of the governor, be drawn from the treasury, on the warrant of the comptroller, in favor of such person or persons as shall from time to time be designated by the governor, and the sum of $3,000,000, or so much thereof as might be necessary, was appropriated by the act, out of any moneys in the treasury not otherwise appropriated, to defray the expenses authorized by the act, or any other expenses of mustering the militia of the State, or any part thereof, into the service of the United States.

The act also imposes, for the fiscal year commencing on the 1st day of October, 1861, a State tax for such sum as the comptroller should deem necessary to meet the expenses thereby authorized, not to exceed two mills on each dollar of the valuation of real and personal property in the State,

to be assessed, raised, levied, collected, and paid in the same manner as the other State taxes are levied, assessed, collected, and paid into the treasury. (2 Laws of New York, session of 1861, pages 631, 636.)

11 III.

There was no money in the treasury of the State in 1861 which was not specifically appropriated for the expenses of the State government, and no money which could be used to defray the expenses of enlisting, enrolling, arming, equipping, and mustering such troops into the service of the United States.

IV.

The fiscal year began on the 1st day of October and ended on the 30th day of September, and the tax rate necessary to raise the tax required for the purpose of raising the moneys necessary to defray the expenses of the State government and other expenses authorized by law in any fiscal year is fixed by the legislature, which convenes on the first Tuesday in January preceding the commencement of the fiscal year for which the taxes are required; that is to say, for the fiscal year beginning on the 1st day of October, 1860, and ending on the 30th of September, 1861, the tax rate was fixed by the legislature which began its session on the 1st Tuesday in January, 1860, and the tax rate necessary to defray the expenditures for the fiscal year beginning October 1, 1861, and ending September 30, 1862, was fixed by the legislature which began its session on the first Tuesday of January, 1861.

V.

Under the laws of the State of New York then existing, the moneys to be collected for the State taxes could not reach the State treasury and be made applicable for use in defraying its expenditures until the months of April and May of the fiscal year for which they were levied, and in some instances not until a later date, and the moneys authorized to be raised by the act of 1861 to defray the expenses of enrolling, enlisting, arming, equipping, and mustering in such troops did not reach the State treasury, and were not available for use by the State officers in defraying such expenses, until the months of April and May, 1862.

The State comptroller in 1861 made an apportionment of the State taxes among the several counties, and issued to the board of supervisors of each county a requisition requiring such board to cause to be levied and collected and paid into the State treasury the county's quota of such tax.

The board of supervisors were required by law to meet in the month of November for the purpose, among other things, of levying such tax and apportioning it among the several towns of the county and making out a tax roll and warrant to the collector of taxes in each town for the levy and collection of the town's quota of the tax into the county treasury, and each town had until the 1st day of February in which to pay its quota of said tax into the county treasury, and the county treasurer had until the 1st day of May in which to pay the quota of the county into the State treas-

ury, and if he failed to pay in the amount by that time the comptroller might report the matter to the attorney-general, who must wait thirty days, or until the 1st day of June, before proceedings could be taken to compel payment.

12

VI.

The total tax rate of the State, fixed at the session of the legislature beginning on the first Tuesday in January, 1861, was $3\frac{1}{8}$ mills, of which $1\frac{1}{2}$ mills was the amount of the tax authorized by chapter 277, and the moneys realized from this tax were paid into the State treasury as follows:

In January, 1862	$190,403.72
In February, 1862	153,792.32
In March, 1862	696,696.00
In April, 1862	170,909.34
In May, 1862	614,307.09
In June, 1862	1,345,671.61
In July, 1862	68,365.27
In August, 1862	180,023.03
In September, 1862	800,246.93
And the sum of, subsequent to October	274,590.64

VII.

The State of New York had no other means of raising the money required for the purpose of immediately defraying the expenses of enlisting, enrolling, arming, equipping, and mustering in such troops, except by borrowing money in anticipation of the collection of its State tax, and between June 3, 1861, and July 2, 1861, it issued for that purpose bonds in anticipation of such State tax, to provide for the public defence, to the amount of $1,250,000, payable on July 1, 1862, except that $100,000 was payable June 1, 1862, at the rate of seven per cent. per annum, payable quarterly, which at that time was the legal rate of interest under the laws of the State of New York.

The issue of all these bonds was necessary for the purpose of providing the money required, and the full amount of the face value of such bonds was received by the State, upon the sale thereof, and was used and applied by it, together with other moneys, in raising troops, and the entire sum expended by the State for such purpose, between the 23d day of April, 1861, and the 1st day of January, 1862, was $2,873,501.19, exclusive of any interest upon the bonds or loans made by the State for that purpose.

VIII.

In addition to the sums aforesaid, the State of New York paid, on account of interest which from time to time accrued on said bonds issued in anticipation of the tax for the public defence, the sum of $91,320.84, as follows:

1861.	
October 1st	$1,750.00
Same date	2,197.20
December 27th	22,331.97
1862.	
January 2d	1,750.00
Same date	1,750.00
March 26th	18,375.00

April 1st	$1,750.00
Same date	1,750.00
June 3d	1,166.67
June 26	18,375.00
July 1st	1,750.00
Same date	1,750.00
September 26th	16,625.00
Total	$91,320.84

13 And by chapter 192 of the Laws of the State of New York of the session of 1862, passed April 12th, the legislature specifically appropriated the sum of $1,250,000 "for the redemption of comptroller's bonds issued for loans to the treasury in anticipation of the State tax to provide for the public defence, imposed by chapter 277 of the laws of 1861, reimbursable, viz: $100,000 on the first day of June, and $1,150,000 on the first day of July, 1862, and the further sum of $91,320.84 for the payment of the accruing interest on said bonds."

IX.

Of the remainder of the above sum of $2,873,501.19 necessarily expended by the State of New York, for the purpose aforesaid, between April, 1861, and January, 1862, after deducting the amount of $1,250,000, raised by issue of bonds, the sum of $1,623,501.19 was taken from the canal fund, so called, of the State, which fund, under the constitution of the State, is a sinking fund for the ultimate payment of what is known as the canal debt of the State.

Under the tax rate of 1860 there had been levied and collected and paid into the treasury of the State the sum of $2,039,663.06 for the benefit of and to the credit of the canal fund, which moneys reached the treasury of the State in April and May, 1861, and were then in the treasury to be invested by the State officers, pursuant to the requirements of law and the constitution of the State, in securities for the benefit of the canal fund, and the interest accruing on which must be paid into that fund, and on May 21, 1861, the lieutenant-governor, comptroller, treasurer, and the attorney-general, who constituted the commissioners of the canal fund, authorized the comptroller to use $2,000,000 of the canal-fund moneys for military purposes until the 1st day of October next, and $1,000,000 until the 1st day of January, 1862, at five per cent., and of this amount the sum of $1,623,501.19 was used by the comptroller for the purpose of defraying the expenses of raising and equipping such troops. The following is the order:

"STATE OF NEW YORK, CANAL DEPARTMENT,
"*Albany, May* 21, 1861.

"The comptroller is to be permitted to use two millions of dollars of the canal fund monies for military purposes until the first day of October next, when the commissioners of the canal fund will invest one million of dollars of the canal sinking fund under section 1, article 7, in the tax levied for military purposes until the 1st of July, 1862, at five per cent., and the comptroller may use one million of dollars of the tax levied to pay interest on the $12,000,000 debt until the 1st of January, 1862, when the commissioners will, if they have the means, replace that or as large an

amount as they may have the means to do it with from the toll of the next fiscal year, so as that the whole advance from the canal fund on account of the tax be two millions of dollars. It is understood the comptroller will retain the taxes now in the process of collection for canal purposes until the above investments are made, paying the funds five per cent. interest therefor.

"Endorsed: We assent to the within named arrangement, Albany, May 22, 1861.

"R. CAMPBELL,
"*Lieut. Govr.*
"ROBERT DENNISTON,
"P. DORSHEIMER,
"CHS. G. MYERS,
"*Comm's of the Canal Fund.*"

14 On December 28, 29, and 31, 1861, the United States repaid to the State, on account of moneys so expended, the sum of $1,113,000, leaving the sum of $510,501.19 unpaid of the moneys which had been used from the canal fund, and which sum was placed to the canal fund, with interest, on April 4, 1862.

The amount of interest at 5 per cent. per annum on the moneys so used of the canal fund during the time it was used by the State for the public defense, in raising troops, was $48,187.13. But during the same time the State had received interest on portions of the money while it was lying in bank unused to the amount of $8,319.95, and the net deficiency of the State on account of interest on such moneys during the period which they were so used was $39,867.18, which sum was paid into the canal fund from the State treasury, April 4, 1861.

X.

The total amount of the sums so paid by the State of New York for interest upon its bonds issued in anticipation of the tax for the public defense, and of the amount placed by it in the canal fund for moneys used of that fund, as aforesaid, for the purpose of defraying the expenses of raising and equipping such troops, is $131,188.02, and no part of the same has been paid to the State of New York by the United States, nor has the State been reimbursed therefor, or for any part thereof, by the United States.

XI.

On September 5, 1861, the Federal War Department, by a general order, directed all persons having authority to raise voolunteer regiments, batteries, or companies in the State of New York to report to Hon. Edwin D. Morgan, governor of the State, at Albany, and they and their commands were placed under the command of Governor Morgan, who was given authority to reorganize them and prepare them for the service in such manner as he might deem most advantageous for the interests of the General Government.

The order also provided that all commissioned officers of such regiments, batteries, or companies now in service, raised in the State of New York,

independent of the State authorities, might receive commissions from the governor of the State by reporting to the adjutant-general of the State and filing in his office a duplicate of the muster rolls of their respective organizations.

XII.

On September 28, 1861, Governor Morgan was commissioned a major-general in the military service of the United States, and on October 26, 1861, a new military department was created, to be called the Department of the State of New York, and placed under command of Governor Morgan, as major-general of volunteers in the service of the United States, with headquarters at Albany.

15 XIII.

On June 27, 1861, Hon. William H. Seward, Secretary of State of the United States, telegraphed to Governor Morgan, acknowledging that New York had furnished fifty thousand troops for service in the war of the rebellion, and thanking the governor for his efforts in that direction, and on July 25, 1861, Secretary Seward telegraphed Governor Morgan: "Buy arms and equipments as fast as you can. We pay all." And on July 27, 1861, that "Treasury notes for part advances will be furnished on your call for them." And on August 16, 1861, Hon. Simon Cameron, then Secretary of War of the United States, telegraphed to Governor Morgan: "Adopt such measures as may be necessary to fill up your regiments as rapidly as possible. We need the men. Let me know the best the Empire State can do to aid the country in the present emergency." On February 11, 1862, Hon. Edwin M. Stanton, Secretary of War, telegraphed Governor Morgan: "The Government will refund the State for the advances for troops as speedily as the Treasurer can obtain funds for that purpose."

Governor Morgan continued to be major-general of volunteers in the Federal military service until about the expiration of his term of office as governor, on the first day of January, 1863, when he tendered his resignation, which was subsequently accepted.

XIV.

The moneys above specified, which were actually expended by the State of New York, were necessarily paid out and expended for the purpose of enlisting, enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting such troops, and causing them to be mustered into the military service of the United States, where they were employed in aiding to suppress the insurrection which then existed against the Government of the United States, known as the war of the rebellion, and were so paid and expended at the request of the civil and military authorities of the United States.

XV.

A large portion of such expenditures were made and incurred by the Hon. Edwin D. Morgan, governor of the State, while acting in that capacity, and pursuant to his authority as such major-general.

XVI.

Prior to January 3, 1889, the State of New York had presented, from time to time, various claims and accounts to the Treasury Department of the United States, for settlement and allowance, for the charges and expenses incurred by it in enlisting, enrolling, arming, equipping, and mustering into the military service of the United States such troops, which claims amounted in aggregate to $2,950,479.46, and included charges for all the moneys paid and placed as hereinbefore specified.

That such Department has allowed thereon, from time to time, various sums, amounting in the aggregate to $2,775,915.24, leaving a balance of $174,564.22, not allowed, and the claims and accounts for which were pending in said Department unadjusted on said 3d day of January, 1889.

16 That of said sum of $174,564.22, not allowed by the Treasury Department, the sums hereinbefore specified, amounting to $131,188.02, constituted a part, and on said 3d day of January, 1889, the Hon. Charles S. Fairchild, then Secretary of the Treasury of the United States, transmitted to this court, under section 1063 of the Revised Statutes of the United States, the said claim of the State of New York, so pending in said Department, for said sum of $131,188.02, together with the vouchers, proofs, and documents relating thereto on file in said Department, to be proceeded with in this court according to law.

The claim of the State of New York for expenditures and expenses in furnishing troops with clothing and munitions of war, as set forth in the foregoing findings, was filed in the Treasury Department in May, 1862, which claim included said items for interest, and said claim for interest has from said time been suspended in said Department, and was so suspended at the time the matter was transmitted to this court.

CONCLUSION OF LAW.

Upon the foregoing findings the court determines as a conclusion of law that the claimant is entitled to recover the sum of ninety-one thousand three hundred and twenty dollars and eighty-four cents ($91,320.84).

17 ## V. *Opinions.*

WELDON, J., delivered the opinion of the court.

The petition alleges, that the defendants became indebted to the claimant, on the first day of July, 1862, for money laid out and expended, to and for the use of defendants, at their request, in the sum of $3,131,188.02, and of this there has been paid the sum of $3,000,000, leaving a balance due the petitioner of $131,188.02.

It is further alleged that the necessity of said expenditure grew out of the wants of the Government in the early part of the civil war; and that for the purpose of maintaining national authority, through their proper officers said defendants requested the State of New York, in common with other States, to provide means and munitions of war for the use of the Government; that in pursuance of such request the claimant did provide

and render to the United States a large number of troops, and did equip the same with arms, clothing, and munitions of war; and did also render to the Government arms and munitions in addition to such as were required for the use of troops enrolled in the State of New York; that in equipping said troops and in furnishing said material for other troops the said State expended the sum of $3,000,000; that in complying with said request so made by the defendants, in furnishing equipments for troops, the claimant was compelled to borrow a large part of said sum, there not being in the treasury of said State funds sufficient to meet said expenditure; that bonds of said State were issued upon which claimant was compelled and did pay a large amount of interest, to wit, the sum of $131,188.02; that under the act of Congress of July 27th, 1861, a portion of the expenditure of said claimant has been paid by defendants, but there still remains unpaid a portion of the costs, charges, and
18 expenses properly incurred by said State in enrolling, subsisting, clothing, supplying, arming, equiping, paying, and transporting said troops as aforesaid, to wit, the amount paid by the State of New York for interest, the said sum of $131,188.02; that after the payment of said sum, and within six years from such payment, a claim for said amount was presented to the Secretary of the Treasury, and such proceedings were thereon had in the Treasury Department, and before the proper officer thereof, to wit, the Second Comptroller; that on or about the 23d day of December, 1869, the question of said claim for interest so paid by the State of New York, as aforesaid, against the United States was suspended, subject to future decision; and thereafter, on or about the 7th day of June, 1882, the said claim and the question of the validity thereof was presented to the Attorney General of the United States for his opinion, and said Attorney General thereafter, and on or about the 23d day of July, 1883, rendered his opinion thereon, and the same was filed in the Treasury Department of the United States, which opinion is to the effect that said claim of the State of New York does not come within the provisions of the act of July 27th, 1861. Thereafter such proceedings were had in the Treasury Department in the matter of said claim; that, at the request of said claimant, by its attorney-in-fact, on or about the 3d day of January, 1889, the Secretary of the Treasury did, under the provisions of section 1063 of the Revised Statutes of the United States, transmit the said claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to the Court of Claims, there to be proceeded in accordance with law.

The findings in substance tend to maintain the allegations of the petitions except in the amount actually paid by claimant as interest, on the funds used in the purchase of material, and the payment of expenses incident to the equipment of troops.

Of said $131,188.02, the sum of $39,867.18, is based upon the following state of facts:

Under the tax rate of 1860 of said State there had been levied, collected and paid into the treasury of said State the sum of $2,039,663.06 for the benefit of the canal fund, which money reached the treasury in April and May 1861, and was then in the treasury, to be invested by certain State officers, pursuant to the law and requirements of the constitution, of the State, in securities for the benefit of the canal fund.

On the 21st day of May, 1861, the lieutenant governor, comptroller, treasurer, and attorney-general, who constituted the commissioners of the canal fund authorized the comptroller to use $2,000,000 of the canal fund money, for military purposes until the first day of October following, and $1,000,000 until the first day of January, 1862, at 5 per cent, and of this amount, the sum of $1,623,501.19 was used by the comptroller, for the purposes of defraying the expense, in raising, and equipping troops as aforesaid.

On December 28, 29 and 31, 1861, the United States repaid to the State, on account of moneys so expended the sum of $1,113,000, leaving the sum of $510,501.19 unpaid of the moneys, which had been used from the canal fund, and which sum was placed to the canal fund, with interest, on April 4, 1862.

19 The total amount of interest on the moneys so used from the canal fund, during the time that it was used, by the State for the public defense, in raising troops, was $48,187.13. But, during the same time, the State received interest on some portions of the money, while it was lying in bank, to the amount of $8,319.95, and the net deficiency of the State, on account of interest on such moneys during the period which they were so used, is $39,867.18, which sum was paid into the canal fund from the State treasury, April 4, 1862.

The order made by said State officers under and by virtue of which the money of the canal fund was appropriated is as follows:

"STATE OF NEW YORK, CANAL DEPARTMENT,
Albany, May 21, 1861.

"The comptroller is to be permitted to use two millions of dollars of the canal fund monies for military purposes until the first day of October next, when the commissioners of the canal fund will invest one million dollars of the canal sinking fund under section 1, article 7, in the tax levied for military purposes until the 1st of July, 1862, at five per cent, and the comptroller may use one million of dollars of the tax levied to pay interest on the $12,000,000 debt until the 1st of January, 1862, when the commissioners will, if they have the means, replace that or as large an amount as they may have the means to do it with from the toll of the next fiscal year, so as that the whole advance from the canal fund on account of the tax be two millions of dollars. It is understood the comptroller will retain the taxes now in the process of collection for canal purposes until the above investments are made, paying the funds five per cent interest therefor.

"Endorsed: We assent to the within named arrangement, Albany, May 22, 1861.

"R. CAMPBELL,
"*Lieut. Govr.*
"ROBERT DENNISON,
"P. DORSHEIMER,
"CHS. G. MYERS,
"*Comm's. of the Canal Fund.*"

The amount of money actually paid as interest on the bonds issued is $91,320.84, and the amount of interest credited to and paid into the canal

fund for the money used of said canal fund is $39,867.18; those two sums make in the aggregate the sum of $131,188.02, and for that amount this proceeding was commenced and is prosecuted.

Incident to the commencement of the civil war, which was inaugurated in its hostilities by the bombardment of Fort Sumpter by the Confederate forces, there arose an emergency and crisis in the history and condition of the United States, which called for the most effective and vigorous measures of military preparation on the part of the federal power to maintain its authority and to preserve from dismemberment the union of the States. And although the requisition of the 75 thousand troops provided for in the first proclamation of the President was thought to be adequate, the subsequent development and magnitude of the insurrection, demonstrated the inability of that force to accomplish the purpose of reestablishing the national supremacy in the States assuming to exercise the right of secession, and the maintenance of that right by military force.

At the time of the commencement of the war Congress was not in session, and the Executive Department was compelled to avail itself of all the constitutional means within its power to deal with an existing state of hostility, and for that purpose on the 15th of April, 1861, the President issued a proclamation calling for the militia of the several States "in order to suppress combinations and cause the laws to be duly executed."

Upon the same day the legislature of New York passed an act making an appropriation of $3,000,000 to be applied in the expenditure for arms, supplies, and equipments for the soldiers mustered into the service of the United States in the suppression of the rebellion; and every assurance was given by the executive branch of the Government, that the State would be reimbursed in its expenditures, in complying with the requirements of the President.

The same proclamation which called for seventy-five thousand men called an extra session of Congress for the fourth day of July following; and in pursuance of that proclamation, the first session of the 37th Congress was held.

On the 27 day of July, 1861, Congress passed an act entitled "An act to indemnify the States for expenses incurred by them in defence of the United States," as follows:

"That the Secretary of the Treasury be, and he is hereby directed, out of any moneys in the Treasury not otherwise appropriated, to pay to the governor of any State, or its duly authorized agents, the costs, charges, and expenses properly incurred by said State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding in suppressing the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury." (12 St. L., p. 276.)

On the 8th of March, 1862, Congress passed a joint resolution as follows:

"Whereas doubts have arisen as to the true intent and meaning of an act entitled 'An act to indemnify the States for expenses incurred by them in defence of the United States,' approved July 27th, 1861.

"Be it resolved by the Senate and House of Representatives in Congress assembled, That the said act shall be construed to apply to expenses incurred as well after as before the date of the approval thereof."

Some question was made in the brief and oral argument of the counsel for the defendants as to proper pendency in this court of these proceedings because of the statute of limitations.

In the case of Finn vs. The United States, 123 U. S. R., 227, it is decided:

"It is a condition or qualification of the right to a judgment against the United States in the Court of Claims, that the claimant when not laboring under any one of the disabilities named in the statute, voluntarily put his claim in suit or present it to the proper Department for settlement within six years after suit could be commenced thereon against the United States."

The findings in the present case show that in 1862, in less than one year after the origin of the claim, the claimant presented it to the proper Department for adjudication and payment, and that from that time until the commencement of this case it was pending in the Department as an unadjusted claim. The State never abandoned it, and the United States through its proper officers never formally rejected it. It was pending in the Treasury Department, within the meaning of the decisions of the Supreme Court and this court, at the time it was transmitted under the order of the Secretary of the Treasury, as shown in the record.

It was not res judicata, and does not come within the law laid down in the case of Jackson vs. The United States, 19 Ct. Cls., 504, and State of Ills. vs. the United States, 20 Ct. Cls., 342.

The court having jurisdiction of the claim, it must be disposed of on its merits.

21 It is manifest, from the legislation, that Congress intended to approve the action of the Executive Department, in the assurance that the States would be reimbursed in their expenditures incident to the enrollment of the militia in defence of the national authority.

It is not necessary to examine and discuss the obligations of the States, in such an unprecedented condition of the Federal Government. It is sufficient to assume that the liability of the defendants in this case depends upon the construction of the act of 1861 and the joint resolution of 1862.

If the claim comes within the scope and terms of the act of 1862, the plaintiff has the right to recover; if it does not, there is no liability.

The aggregate of the demand is $131,188.02, and is composed of two items originating in different forms.

Ninety-one thousand three hundred and twenty dollars and eighty-four cents compose a claim for interest paid by the State on bonds issued by it for the purpose of raising money to defray the expense incident to the enrollment of the soldiers for the national service.

The findings show that the treasury of the State of New York, at the time the call was made, was deficient in the funds requisite to meet the expense, and that it was necessary to negotiate bonds at 7% interest, to supply that deficiency. The said sum of $91,320 is the amount of interest paid on those bonds.

The other item, $39,867.18, of the claim is for an alleged expense growing out of the use of certain funds coming into the treasury of the State

prior to October 1st, 1861, and which were to be invested by the State officers, pursuant to the requirements of law and the constitution of the State in securities for the benefit of the canal fund.

In connection with this item of claim, it may be said that no interest was paid by the State of New York; it simply failed to realize for the benefit of the canal fund certain interest which by the investment of the money appropriated for the use of the defendants, it might otherwise have saved to that fund.

We will consider the rights of the claimant as to each demand separately. It is contended on the part of the claimant that both items come legitimately within "costs, charges, and expenses," as provided by the act of July, 1861, while the defendants insist that as to both items of claim, it is an attempt to compel the United States to pay interest on an alleged obligation, where they have not expressly agreed to do so.

Section 1091, R. S., provides:

"No interest shall be allowed on any claim up to the time of the rendition of the judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest."

In the case of Tillson vs. United States, 100 U. S. R., 43, it was, in substance, decided:

"Where the claim of a party for loss and damage growing out of the alleged failure of the United States to perform its contracts with him, as to time and manner of payment, is, by special act of Congress, referred to the Court of Claims, 'to investigate the same, and to ascertain, determine, and adjudge the amount equitably due, if any, for such loss and damage.'—Held that the rules of law applicable to the adjudication of claims by that court in the exercise of its general jurisdiction must govern, and that interest, not having been stipulated for in the contracts, can not be allowed thereon."

It is not necessary to speculate upon the question of the liability of the Government for the payment of interest as such. The statute and
22 decisions are plain and uniform on that subject, and unless there is an express contract to that effect, no interest can be recovered. If this demand is in law a claim for interest, in the common judicial sense of that term, there being no express undertaking to pay interest, in and by the words of the statute, on which the suit is based, and from which the obligation is deduced no liability exists. It is contended by the claimant's counsel that this is not a proceeding to recover interest as such, but that the demand comes within that clause of the statute providing indemnification to the State for "costs, charges, and expenses" incurred by it in furnishing troops under the call of the President.

A liability upon the part of the Government to pay interest can not arise from implication, for the reason the statute defining the jurisdiction of the court expressly declares that no interest shall be allowed on any claim up to the rendition of the judgment thereon, in the Court of Claims, unless upon a contract expressly stipulating for interest.

Regarding the statute, as having the force of a contract, it has no provision from which by instruction it can be inferred that the defendants assumed to pay the claimant any interest as such, upon any advances made by it, in defraying the expenses of the troops furnished the United States, in pursuance to the proclamation of the President.

The law being that the Government does not pay interest except where the contract or statute expressly provides for the payment of interest, it is unnecessary to examine the many cases referred to by the very able argument of the counsel for the Government. If this is a proceeding to enforce the payment of interest, then the authorities relied on by the defendants are conclusively decisive of this case, and the judgment must be for the defendants.

It was not the duty of the State of New York, as one of the States of the Federal Union, acting independently to suppress the insurrection of 1861; but it was its duty to comply with all constitutional requisitions of the central government, in its efforts to maintain the authority of the United States, and to enforce the law of Federal jurisdiction.

The findings show that in responding to the call of the President for men and means the authorities of the State did everything in their power to comply with the Federal requisition, and in so doing not only availed themselves of the taxing power of the State, but the public credit of the State government, sought the money market, to replenish the treasury of the State in defraying the expenses incident to the call of the President.

In appreciation of the alacrity with which the authorities acted, Congress on the 27 of July, 1861, 23 days after the convention of the Houses, passed the act upon which the claimant now seeks satisfaction and compensation.

It is alleged on the part of the claimant that "the act of July 27, 1861, constitutes a statutory contract of indemnity on the part of the United States with the several States furnishing troops as therein specified, and the payments made by the State of New York, for which this claim is filed, having been actually and necessarily made for the purpose contemplated by that act, they became part of the expenditures made by the State which the Federal Government has obligated itself to reimburse." (Huidekoper's Lessee vs. Douglas, 3 Cranch, R., 1–70.)

The demand of the claimant does not necessarily require that it should maintain the full legal import of this proposition, as the statute
23 of our jurisdiction provides that this court shall have jurisdiction of "all claims founded upon the Constitution of the United States or on any law of Congress." 24 Stat. L., 505.

If, by the terms of the act of July, 1862, Congress assumed to pay the claimant the kind and character of charges represented by the interest paid by the State, and have not done so, the right of the State to recover is clear and unquestionable; and the only question for us to decide in this connection is whether the payment of interest on bonds issued by the claimant comes within the terms "costs, charges, and expenses properly incurred by said State."

In determining that question we must not lose sight of the fundamental proposition of law, that the Government is not liable for interest, unless it has expressly obligated itself to pay interest, and it is not pretended that it has done so in this matter. Whatever may be said in the construction of this statute, the fact remains that the claimant, in the payment of interest to its bondholders, disbursed and expended its money as effectually as though it had paid money directly from the treasury to some person from whom it had purchased clothing and munitions of war.

If the State of New York had limited its effort in complying with the request of the General Government to its actual resources of money in the treasury, it might have been the performance of its duty literally; but if the resources of its credit were opened to it, and it did not avail itself of that resource, the spirit of its obligation would have been violated to the detriment of the public service, and perhaps to the prejudice of the final success of the Federal power. The statute, it will be observed, is broad and liberal in the use of terms defining the obligation of the United States, "costs, charges, and expenses."

In the construction of a law somewhat similar to act of July, 1862, Mr. Wirt, Attorney-General of the United States, gave an opinion stating:

"In construing this law, it is proper to advert to the principle on which it was founded, and to the object which it proposes to effect. The principle is this: The United States are bound by the relation which subsists between the General and State governments to provide the means of carrying on war, and, as a part of the business of war, to provide for the defense of the several States. When the United States fails to make such provision, and the States have to defend themselves by means of their own resources, the expenditures thus incurred forms a debt against the United States which they are bound to reimburse. If the expenditures made for such purpose are supplied from the treasury of the States, the United States reimburse the principal without interest; but if, being itself unable, from the condition of its own finances to meet the emergency, such State has been obliged to borrow money for the purpose, and thus to incur a debt on which she herself has had to pay interest, such debt is essentially a debt due by the United States, and both the principal and interest are to be paid by the United States. So that whenever a State has had to pay interest by reason of her taking the place of the United States in time of war, such interest forms a just charge against the United States. If a State borrows the money at once, on the first occurrence of the emergency, and expends the specific money so borrowed, both the borrowing and the expenditure being flagrante bello, there seems to be no doubt that the claim, both for the principal and the interest, which she would have paid upon such loan, would be a fair charge against the United States on the principle of this law." (1 Op. Atty. Gen., 723.)

Although this opinion was given before the statute forbidding the payment of interest was passed (March 3, 1863, Revised Statutes, 1091), it is important to be considered, in making a legal distinction, between interest actually paid, and interest on funds in the Treasury at the time the requisition was made.

"It has been the general rule of the officers of the Government in adjusting and allowing unliquidated and disputed claims against the
24 United States to refuse to give interest. That this rule is sometimes at variance with that which governs the acts of private citizens in a court of justice would not authorize us to depart from it in this case. The rule however is not mere form, and especially is it not so in regard to claims allowed by special acts of Congress, or referred by such acts to some Department or officer for settlement." (McKee's Case, 91 U. S. R., 442, and 11 C. Cls. R., 72.)

In the performance of the duty under the call the officers of the State purchased the required munitions of war so long as they had funds, and

when they had no money, the Government still needing the supply, they paid out money for the use of money, in order that the State might fully discharge every possible duty in the restoration of Federal authority. The payment of interest was a cost properly incurred by the claimants under the requisition of the President, and comes within the letter of the act of July, 1862, and for that item the claimants have a right to recover.

The second item of claim for $39,867.18 originates in a different form. There was no absolute payment of interest. Under the State policy of New York a portion of the tax is devoted to what is called the canal fund, and upon this fund the State is in the habit of receiving interest, the same being loaned for the benefit of that fund.

The appropriation of the canal fund for the purpose of defraying the expense of equipping the troops of the United States was in the pursuance of the following order:

"STATE OF NEW YORK, CANAL DEPARTMENT,
"*Albany, May* 21, 1861.

"The comptroller is to be permitted to use two millions of dollars of the canal fund monies for military purposes until the first day of October next, when the commissioners of the canal fund will invest one million of dollars of the canal sinking fund under section 1, article 7, in the tax levied for military purposes until the 1st of July, 1862, at five per cent, and the comptroller may use one million of dollars of the tax levied to pay interest on the $12,000,000 debt until the 1st of January, 1862, when the commissioners will, if they have the means, replace that or as large an amount as they may have the means to do it with from the toll of the next fiscal year, so as that the whole advance from the canal fund on account of the tax be two millions of dollars. It is understood the comptroller will retain the taxes now in the process of collection for canal purposes until the above investments are made, paying the funds five per cent interest therefor.

"Endorsed: We assent to the within named arrangement, Albany, May 22, 1861.

"R. CAMPBELL,
"*Lieut. Govr.*
"ROBERT DENNISTON,
"P. DORSHEIMER,
"CHS. G. MYERS,
"*Comm's of the Canal Fund.*

The amount of interest on the money so used of the canal fund during the time it was used by the State for the public defence in raising troops was $48.187.13. But during the same time the State had received interest on a portion of the funds while it was lying in a bank unused to the amount of $8,219.95, and the net deficiency to the State on account of the interest on such money is $39,867.18.

Upon the payment of the money into the treasury, from which this interest would have accumulated, it became the money of the State, and would have so remained after it became a part of the canal fund. While different departments are provided in the State, as well as the National Government, they constitute a part of an indivisable unity; and transactions between the different departments are the official act of the same political power.

The money is transferred from one department to another, or from one fund to another, but it cannot be said that by the transfer there is a lending of money upon which by any fiction of law interest can be calculated. By the use of the canal fund, for the purpose of defraying the expense of raising troops, the State simply appropriated from a particular fund, which, if permitted to become a part of that fund, might have been loaned on interest. It cannot be said that the United States borrowed the money at the agreed rate of interest which other customers would have paid the State, as there is no express or implied obligation to that effect. The State paid no money directly for the use of the money belonging to the canal fund. There may have been an accounting to that fund from some other financial resource of the State, but that transaction was entirely between the different departments of the government, which constitute the political organization of the State of New York.

If an allowance is made for the loss on that fund it is in effect an allowance of interest against the United States on an obligation in an by which they have not expressly agreed to pay interest. During the time the money was diverted from the canal fund to the purposes of the United States the State simply lost the use of that amount. The interest charged on the trust fund cannot be said to be an "expense incurred" within the meaning of the law of 1862, as the State did not assume any liability nor pay any money beyond the actual funds appropriated and paid in the purchase of materials and the payment of the expense of the transportation of troops. In the claim for $91,320.84 a different element exists. The claimant actually paid that amount of money to creditors who had advanced money on the bonds of the State, which had been issued to defray the cost charges and expenses properly incurred "by the State in enrolling, subsisting, clothing, supplying, paying, and transporting" troops employed by the defendants in suppressing the insurrection against the authority of the United States.

In the discussion and determination of the question of the liability of the United States to remunerate the claimant we must not lose sight of what is so fundamental not only in the laws of the United States and decisions of the Supreme Court, but in the jurisdiction of this court—that the defendants are not liable for interest of such, unless they have expressly agreed to pay interest. In subordination to that well established principle of the law the purpose and construction of the act of 1862 must be ascertained and determined. Whatever may be said of the liability of the defendants in the absence of said statute, on the first item of claim, it is clear that for the second they would not be liable, because it is for interest upon an obligation in which they have not expressly agreed to pay interest.

In the legal statement of a cause of action, founded upon the transactions of 1861, between the plaintiff and defendants, the pleading must necessarily allege that the $39,867.13 was interest upon certain advances made by the State, which interest was lost by the claimant because the money was not invested in interest-bearing obligations due the State. The marked difference between the two items of claim is, that in one there was an actual payment of money by the State in complying with the requisition of the General Government, while in the other there was no payment, but a failure to receive interest because of a diversion of the fund as herein indicated.

26 It does not affirmatively appear that the fund upon which the claim of $39,867.18 is based could, for the period of time it was used by the State for the benefit of the defendants, have been loaned; and if during that period other money of that fund was unemployed, the said fund would have been a surplus in the treasury of the State, and no interest was lost to the claimant.

It has been the rule of the Department and the policy of the Government not to pay interest upon claims against the United States, founded on the reason that the Government is always ready to pay all just claims, and if such claims are not paid, it is the fault of the claimant in not presenting his claim in apt time or in not presenting in such a way as to convince the officers of the Government of its lawfulness and justice.

It will be observed that Mr. Attorney-General Wirt makes the distinction between the payment of interest upon money borrowed to enable the State to discharge its duty and fulfill its obligation and interest upon funds in the treasury of the State appropriated for the use and benefit of the United States. The allowance of interest "as expense charges and costs," in the construction of the act, is in derogation of the general policy of the Government in not paying interest, and should not be extended beyond the logical limits of the act of 1862.

The Chief Justice is of opinion that—

"The claimant is seeking indirectly to recover interest contrary to Revised Statutes, § 1091, which prohibits its allowance 'unless upon a contract expressly stipulating for payment of interest.'

"The case was transmitted to this court by the Secretary of the Treasury as a claim for interest alone.

"Interest on temporary loans made to obtain money for equipping, &c., troops for the United States is no more a charge against the Government under the act of 1861 (12 Stat. L., 276) than is interest on long-time bonds issued by many States for the same purpose, computed to time of payment by the Government, for which it is conceded the United States are not liable.

"In either case interest paid constitutes no part of the 'costs, charges, and expenses properly incurred by said State for enrolling, subsisting, clothing, supplying, arming, equipping, and transporting its troops,' within the meaning of the act. It is paid for another purpose, to wit, for the use of money raised to supply an empty treasury, an indirect expenditure, dependent upon collateral contingencies, upon the different conditions of the treasuries, and the different and uncertain legislation of the several States for raising money by taxation, obviously not within the contemplation of Congress and never allowed by the Treasury Department to any State under this act.

"An unequal application of the statute in the different States could not have been intended by Congress.

"If the claim be not for interest within the intent and meaning of Revised Statutes, § 1091, then, as one for the cost of supplying money to the State treasury, it is not unlike a claim for the cost of assessing and collecting taxes for the same object, sooner or later to be incurred, and which, whether incurred before or after the expenditures proper, it is apprehended, nobody would contend could be maintained under the act of 1861.

"Decisions of the courts and opinions of the Attorneys-General before the enactment of the prohibition against allowing interest and before the passage of the act upon which this suit is founded, or independent of them, can have no bearing on this case, which must be governed by the existing statutes and the intention of Congress.

"The only Attorney-General's opinion upon the interpretation of the act of 1862 is that of Attorney-General Brewster on this very claim, wherein he advised against its validity." (17 Opinions Atty. Gen., p. 595.)

It is the judgment of the court that the claimant recover the sum of $91,320.84, and that the $39,867.13 be disallowed.

NOTT, J., concurring:

The term interest covers two distinct things—compensation for
27 the use of money by express agreement; damages allowed by law for the nonpayment of a debt after it has become due. It is the latter which is prohibited in this court in suits against the Government by the Revised Statutes, § 1091.

As to the first item of money expended in the payment of interest upon the bonds of the State which were sold to raise money for the General Government, I concur in the opinion of my brother Weldon. As to the second item of money expended in the payment of interest upon a loan obtained from the canal commissioners for the use of the Government, I dissent.

The grounds upon which I dissent are: 1st, that in order to shield the defendants from making good this loss, it is necessary to hold that a State government can do an unconstitutional act, or, to express it differently, that the unconstitutional act of State authorities must be deemed the act of the State itself; 2d, that a substantial loss has been incurred here by the claim, which the defendants are in honor and good conscience bound to make good, and the intent of the act of indemnity is that the loyal States which acted on behalf of the General Government during the civil war shall be reimbursed and made whole; 3d, that the restriction of the Revised Statutes (§ 1091) prohibiting the recovery of interest as damages in suits against the Government is not applicable to this case, inasmuch as the contract loaning the money expressly provides for the payment of interest, and was ratified by the acceptance of the money and the payment of the principal.

In the application of the act of indemnity to the case, the initial fact of the transaction must be borne in mind. The State of New York was not a corporation whose business was to raise and equip troops for any government that chanced to be engaged in a civil war, but, on the contrary, the President of the United States, in the awful crisis of the hour, went to the State officers and asked that the resources of the State be given in aid of the General Government. The legislature was not then in session, and the State officers had no authority, constitutional or legal, to pledge the credit of the State or involve it in financial liability. From motives of the highest patriotism they assumed an enormous responsibility and proceeded to act on behalf of the General Government. But in their action they were not the agents of the State, nor acting on its behalf, nor assuming to promote its interest. If they were anybody's agents, they were the agents of the General Government, and for their unauthorized acts the

General Government is, in law and morals and under the terms of this act of indemnity, bound to make good the losses which the unauthorized acts of these officers caused the State.

This, then, being the status of the parties, the governor and comptroller proceeded to borrow money, not for the use and benefit of the State, nor by its authority, nor at its request, but for the use and benefit and at the request of the General Government. They borrowed from two sources: from ordinary lenders who had money to invest, by selling them the interest-bearing bonds of the State, and from a board of trustees known as the commis'ioners of the canal fund, who had moneys in their hands to loan on interest-bearing securities and only on interest-bearing securities. In course of time these loans matured, and the State assumed and paid them, principal and interest. The General Government, under the
28 act of indemnity, has paid the principal which the State expended for its use, but has refused to pay the interest.

When the General Government requested the State officers to act in its behalf they might have proceeded in one of three different ways. They might have bought the military supplies on an indefinite credit, and allowed the vendor to add the unknown and undetermined interest to the price; they might have purchased by contracts bearing interest which would run until the price should be paid by the General Government; they might have borrowed money on interest and bought the goods at the lowest price for cash. As to the first method, there can be no question that if it had been pursued the Government would have been liable for the price paid. As to the second method, there can hardly be a question as to the Government's liability for both principal and interest. As to the third method, it is the one which has occasioned the controversy of the present suit. Yet from a business point of view the first method was the worst, and the third, as every man of business knows, was the best. The eminent merchant who was then the governor of the State proceeded as he would have proceeded for a brother merchant. He raised the money, and went into the market and purchased at the lowest cash prices.

The money which the State of New York, through its officers, thus expended at the request and for the use of the United States was not in its treasury, but was procured from two sources.

First, the State issued and sold its own bonds, bearing seven per cent interest. The General Government lost nothing by that. The credit of the State was better than the credit of the General Government, and a saving was effected by the State loaning its own credit for the procurement of the necessary funds. It was able at that time both to buy and to borrow on better terms than the principal for whom it was acting. It has charged nothing for the use of its credit thus loaned, and is merely seeking to be repaid the money which it expended.

The second source from which money was procured for the use of the United States was the canal fund of the State of New York. This fund was, so far as the State was concerned, a sinking fund for the reduction of a public debt; but it was also an interest-bearing trust fund pledged to a designated class of creditors. I emphasize the statement that it was an interest-bearing fund; for it was in no sense an accumulation of idle money in one of the coffers of the State, but was in fact and in contemplation of law a mass of interest-bearing securities held and accumulated for the

future liquidation of a specific debt, and was at the same time pledged to the holders of the debt. The commissioners of the fund had no right to hoard the money which came to their hands, and had no right to loan it without interest. The scope of their duties was to invest, and to invest at interest, and the purpose of the fund, the chief, if not the sole purpose, was that money from time to time accumulated for the extinction of the canal debt should not lie idle in the treasury of the State, but should be invested in securities which would yield, until the debt matured, that profit which we call interest.

If the State had issued more bonds than it did for money wherewith to serve the General Government, and the canal commissioners had gone into the market and bought these bonds, the circumlocution would doubt-
29 less have saved the State from the delay and vexation which beset this branch of the case, and would have made plain to all minds that the State had incurred obligations and loaned its credit and paid interest, not for its own use or benefit, but for the use and benefit of the General Government. Yet this circuity of procedure would not have made the State any better off or the General Government any worse. The principle which would have governed and the result which would have been reached would have been the same.

If this charge of interest had been a mere act of the State officers, whereby the State made interest which otherwise it would not have made, the charge would be in the nature of a profit and beyond the scope of an instrument of indemnity. But in the actual case before the court, the canal fund existed long before the General Government came to the State as a borrower. It had been created and was regulated by the constitution of the State. Whoever got money from the canal fund must take it on the terms prescribed by the constitution. Neither the State officers nor the State legislature nor the General Government nor any power known to our constitutional system could take it upon any other terms or authorize it to be taken. Neither could it be applied to any purpose or business of the State; and whatever might be received from a loan in the way of interest did not go into the treasury of the State, but returned to the fund. The State itself had no power over the canal fund. Undoubtedly the State was directly interested in the fund as a public debtor, and undoubtedly the legal title to the fund was vested in the State; but beside the State was another party equally interested in the fund, the public creditors, who had loaned money upon the faith of it and who were in law a cestui que trust and in equity the owners of the fund.

Accordingly, when the governor and comptroller of the State, who were practically acting as agents of the United States, sought a loan from the canal fund to be expended for the uses and purposes of the General Government, they proposed and agreed to the constitutional condition of interest, and expressly agreed that the loan should bear interest at the rate of five per cent. The canal commissioners had no authority to make the loan without interest, and they did not assume to do so; and the State subsequently recognized the obligation which it owed to its creditors, and paid the interest on this specific loan out of money raised by taxation; that is to say, the taxpayers of New York made good to the canal fund the interest which would otherwise have been realized from ordinary securities, but the United States have not yet reimbursed them for the taxes

that both in form and in fact were devoted to that purpose. These are in brief the ultimate facts of the transaction; the question of law involved is whether the act of indemnity extends to them.

The act of indemnity is not a statute to regulate the purchase of supplies or to restrict the compensation of purchasing agents. If the State of New York had been a merchant selling goods for the sake of profit or a commission merchant rendering service in consideration of a percentage, it would have to take the profits or losses which legally resulted. But the State rendered its service gratuitously; it had nothing to make and, as the result proves, a risk to bear, and it acted at the request of the Government. The obligation which would rest upon an individual in such a case would be to make the other party whole, and it would be an obligation of the strongest character, legally, equitably, morally. The General Government has recognized this obligation, and has passed this act of indemnity. The purpose of an act as of an instrument of indemnity is to make the injured party whole. It is not a grant; it is not one of those statutes in which doubtful words or phrases are to be strictly construed; an interpretation which leaves the injured party without the indemnity which he ought to have is an interpretation which fails to carry into effect the confessed purpose of the statute. If an individual or a body corporate had accepted the fruits of the loan and recognized the transaction by paying the principal, his acts would constitute a binding ratification. The act of indemnity must surely be as broad as the legal obligations of the United States.

As has been said, the State was called upon to act for the General Government, and acted by borrowing money to raise and equip troops. All of this money was expended in the business and on the behalf of the United States. Some of it was borrowed from ordinary lenders, by the State selling its own bonds; some of it was borrowed from a trust fund, of which the State was the trustee. When the interest on the bonds became due the State took the money of its taxpayers and paid it. When the interest on the other loan became due the State likewise took the money of its taxpayers and paid it also. To that extent the taxpayers of the State are just so much the worse off than they would be if the State officers had never touched the trust fund and borrowed from it for the use of the General Government. Both in form and in substance this interest was money paid. In form the transaction complies with the terms of the act of indemnity; in substance the distinction between interest lost and interest paid is too refined to be applied against the purpose of the statute.

And this distinction necessarily rests on the, constructively, illegal action of the State officers. That is to say, if the custodians of the fund acted in a constitutional and legal manner by loaning the trust moneys in their charge to the United States, through the intermediation of the governor and comptroller of the State, at an agreed rate of interest, the refunding of the interest was an expenditure for the use of the Government; but if they acted in an unconstitutional and illegal manner by diverting, misappropriating, or misapplying the trust fund to State purposes, then the State can not make money out of the transaction, and the General Government is not liable.

Scofield, J., was absent when this case was argued and took no part in the decision.

31 VI. *Judgment of the court.*

THE STATE OF NEW YORK
vs.
THE UNITED STATES. } 16430.

At a Court of Claims, held in the city of Washington, on the 8th day of June, A. D. 1891, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, the State of New York, do have and recover of and from the United States the sum of ninety-one thousand three hundred and twenty dollars and eighty-four cents.

BY THE COURT.

32 VII. *Application for and allowance of appeal.*

THE STATE OF NEW YORK
vs.
THE UNITED STATES. } No. 16430.

From the judgment rendered in the above-entitled cause on the 8th day of June, 1891, in favor of claimant, the defendants, by their Attorney-General, on the 8th day of August, 1891, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed and allowed Aug. 8, 1891, in vacation.

WILLIAM A. RICHARDSON,
Chief Justice.

33 VIII. *Application of claimant for and allowance of appeal.*

Term of 1890–'91.

STATE OF NEW YORK
vs.
THE UNITED STATES. } No. 16430.

From the judgment rendered in the above-entitled cause on June 8, 1891, in favor of claimant, the claimant, by their attorney, on the 13th day of August, 1891, make application for and give notice of an appeal to the Supreme Court of the United States.

GEORGE K. FRENCH,
Attorney for Claimant.

Filed and allowed August 13, 1891, in vacation.

WILLIAM A. RICHARDSON,
Chief Justice.

34 In the Court of Claims.

THE STATE OF NEW YORK
vs.
THE UNITED STATES. } No. 16430.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the findings of fact by the court and the conclusion of law thereon; of the opinion of the court by Judge Weldon; of the dissent of Chief Justice Richardson; of the concurring opinion of Judge Nott; of the judgment of the court; of the application by the defendants for and the allowance of appeal to the Supreme Court of the United States; of the application of the claimant for and the allowance of appeal to said Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 15th day of August, 1891.

[SEAL.] JOHN RANDOLPH,
Ass't. Clerk Court of Claims.

(Indorsement on cover:) No. 285. 14831. The United States, appellant, vs. the State of New York. Filed August 31, 1891. No. 422. 15083. The State of New York, appellant, vs. The United States. Filed July 15, 1892. Court of Claims.

FILED.
MAR 11 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

THE STATE OF NEW YORK,
appellant,
v.
THE UNITED STATES.

No. 422. Appeal from the Court of Claims.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

In the Supreme Court of the United States.

THE STATE OF NEW YORK, appellant, *v.* THE UNITED STATES.	No. 422. Appeal from the Court of Claims.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

The claim of the appellant for costs, charges and expenses, properly incurred for enrolling, subsisting, etc., its troops employed in aiding in suppressing the rebellion, was presented to the secretary of the treasury within six years after the same became due. Said claim remained pending and undisposed of in said treasury department until January 3, 1889, at which date it was transmitted by the treasury department to the Court of Claims at the request of the appellant. (Page 3.)

The communication of the treasury department to the said court, which accompanied the papers in the case, reads as follows:

TREASURY DERARTMENT,
OFFICE OF THE SECRETARY.

Washington, D. C., *January* 3, 1889.

To the Honorable the Chief Justice and Judges of the Court of Claims:

I have the honor to transmit herewith the papers pertaining to the claim of the State of New York now pending in this department for interest paid or money borrowed and expended in enrolling, subsisting, etc., its troops employed in aiding to suppress the rebellion of 1861, which said claim involves controverted questions of law, and the amount in controversy exceeds three thousand dollars.

This case is transmitted to your honorable court under and by authority of section 1063 of the Revised Statutes of the United States, to be there proceeded in according to law.

Respectfully yours,

C. S. FAIRCHILD,

Secretary. (Page 1.)

The State of New York thereupon filed its petition, and issue was joined March 25, 1889, at which date traverse was filed. (Page 5.)

The court heard the evidence, upon which it found certain findings of fact and conclusions of law, and directed judgment for the appellant for part of the claim. Appeal was thereupon taken by both parties to the controversy. (Page 26.)

Motion is now made to dismiss the appeal of the State of New York on the ground that appeal will not lie from findings of fact and conclusions of law of the Court of Claims upon a claim transmitted to it by a department with the consent of the claimant.

The grounds urged in support of this contention resolve themselves into a single proposition, to wit: That although the court directed judgment for the claimant, and judgment was accordingly entered, the power to direct such judgment was not conferred by statute, and the court accordingly acted without jurisdiction, and the judgment is a nullity. In other words, the matter is to be treated as if no judgment had ever been rendered, as if the court had merely reported its findings to the treasury department.

I.

It is submitted this is a question which can only be presented to this court on an appeal from the judgment.

Section 13 of chapter 359, Acts of 1887, reads as follows:

That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," approved March third, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, *upon the facts established*, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings thereon to either house of Congress or to the department by which the same was referred to said court. [Sec. 13, chap. 359, Acts of 1887.]

Assuming the case at bar to have come before the Court of Claims under the provisions of section 12 of said act of 1887, it must be concluded that it appeared "to the satisfaction of the court that it had jurisdiction to render judg-

ment." In rendering judgment, therefore, the court simply obeyed the direction contained in said section 13. And right here is the distinction between the case at bar and *In re Sanborn* (148 U. S., 222).

In that case the Court of Claims had declined to render judgment, evidently not being satisfied "upon the facts established that it had jurisdiction to render judgment or decree thereon under existing laws." Very properly, therefore, the Supreme Court declined to allow an appeal from the findings of fact and law reported by the court to the department transmitting the case.

As the court, in its opinion, well says, there was no judgment or decree of the Court of Claims which was binding on any one, or which could be enforced by execution or other process. Not so with the case at bar. Here there is a judgment.

II.

There being a judgment, it is proper for the State of New York to cause its review on appeal to this court.

"An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court."

§ 707, R. S.

III.

The very apparent purpose of the motion to dismiss is to secure from this court a review of the action of the Court

of Claims in rendering the judgment. At any rate, such review is necessary if the appeal be dismissed.

It is submitted such review can only be had on appeal or writ of error. In other words, where the motion to dismiss involves the very question raised by the appeal, the motion must be denied.

Foster's Fed. Pr., §,489, and cases cited

IV.

The Court of Claims, at the term at which the judgment was rendered, might have entertained a motion to vacate the judgment. The term having adjourned, the judgment can only be reviewed on appeal to the Supreme Court.

" But it is a rule equally well established, that after the term has ended all final judgments and decrees pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them, and if error exist, they can only be corrected by such proceeding *by writ of error or appeal* as may be allowed in a court which by law can review the decision."

Bronson v. Schulten, 104 U. S. 415.
Citing Brooks v. Rwy. Co., 102 U. S. 107.
Public Schools v. Walker, 9 Wall. 603.
Brown v. Aspden, 14 How. 25.
Cameron v. McRoberts, 3 Wheat. 591.
Sibbold v. U. S., 12 Pet. 488.

V.

It has not been deemed advisable to enlarge the discussion as to the power of the Court of Claims to render the judgment appealed from. Such question more properly belongs to the argument of the appeal. It may be well, however, to

suggest that ample jurisdiction is conferred by section 13 of the act of March 3, 1887, upon the Court of Claims to determine whether or not it had power to render the judgment. That being so, the judgment is not void, in the sense that it is a nullity, and it can only be set aside in the court below, or on appeal.

Cases cited *supra*.

VI.

The question of the implied repeal of the section of the Revised Statutes and of the Bowman act by the enactment of the Tucker act has also been avoided, for the reason that it is one also deemed by counsel more proper for discussion on the argument of the appeal. It is not considered out of place, however, to refer this court to the fact that the Court of Claims have, at various times, rendered judgment on claims transmitted to it by various departments of government, and that appeals therefrom have been argued and disposed of by this court.

De Arnaud v. U. S., 151 U. S. 483.

Respectfully submitted,

W. A. BEACH,

Of Counsel for Appellant.

W. Hallett Phillips

of Counsel

Office Supreme Court, U. S.
FILED.
FEB 28 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE STATE OF NEW YORK, appellant, *v.* THE UNITED STATES. } No. 422. Appeal from the Court of Claims.

MOTION TO DISMISS.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE STATE OF NEW YORK, appellant, *v.* THE UNITED STATES. } No. 422. Appeal from the Court of Claims.

MOTION TO DISMISS.

Comes now the Solicitor-General on behalf of the respondent, and moves the court to dismiss the appeal of the State of New York herein, for the reason that the judgment of the Court of Claims herein is not obligatory in character, but ancillary and advisory only, and that this proceeding is not a suit, and that the findings, conclusion of law, and judgment herein are not appealable in character. Wherefore this court has no jurisdiction in the premises.

HOLMES CONRAD,
Solicitor General.

13542

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE STATE OF NEW YORK, appellant, v. THE UNITED STATES. | No. 422. Appeal from the Court of Claims.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

This was not an original suit in the Court of Claims, but was a case transmitted by the Secretary of the Treasury.

The appellant's claim was presented to the Secretary of the Treasury about 1862, and was transmitted to the Court of Claims January 3, 1889. The Secretary of the Treasury, in sending the papers, made the following statement:

> This case is transferred to your honorable court under and by authority of section 1063 of the Revised Statutes of the United States, to be there proceeded in according to law (p. 1).

The case was transmitted on request of the claimant (p. 3).

The court made certain findings, and inferred therefrom a conclusion of law partly favorable to the claimant and partly adverse. It thereupon ordered judgment to be entered up in favor of the claimant and against the United States for the amount allowed. Both parties then appealed (p. 26).

Believing this "judgment" not to be appealable, the United States moves to dismiss the appeal taken by the State of New York in order to settle the question. If this motion is granted, the dismissal of the appeal taken by the United States (No. 285) must, of course, follow.

The main question raised by this motion is, whether § 1063 of the Revised Statutes was still in force at the time that this case was transmitted by the Secretary of the Treasury. That section is as follows:

> Whenever any claim is made against any Executive Department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim, of the character,

amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.

The Bowman Act of March 3, 1883, ch. 116, § 2, provided as follows:

> That when a claim or matter is pending in any of the Executive Departments, which may involve controverted questions of fact or law, the head of such Department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the Department by which it was transmitted for its guidance and action.

The Tucker Act of March 3, 1887, ch. 359, § 12, provided as follows:

> That when any claim or matter may be pending in any of the Executive Departments, which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted.

The Tucker Act, in which this paragraph appears, purports on its face to contain a complete set of provisions regulating the jurisdiction of the Court of Claims, which provisions are apparently intended as a substitute for the prior laws in that particular, although not superseding all of the provisions relating to procedure; except that § 13 seems to assume some provision of the Bowman Act to be still in force. It is submitted that since the Bowman Act, or at least since the Tucker Act, § 1063 of the Revised Statutes is to be regarded as impliedly repealed or abrogated.

I.

Assuming that § 1063 of the Revised Statutes is abrogated by the Tucker Act, it is not intended here to argue that the Court of Claims obtained no jurisdiction on account of the mention of that section in the letter from the Secretary of the Treasury. It is believed that this reference might be regarded as a clerical error and the case treated as if sent under the Tucker Act. (Compare *Arthur* v. *Morgan*, 112 U. S., 495.)

II.

But if the case is to be regarded as transmitted under § 12 of the Tucker Act, it is settled that the decision of the Court of Claims is not appealable. (*In re Sanborn*, 148 U. S., 222.)

III.

The question, therefore, is as above stated, whether § 1063 is still in operation or whether it is supplanted by the paragraph above quoted from the Tucker Act.

The Court of Claims consider the provisions above cited from the Revised Statutes, the Bowman Act, and the Tucker Act as all in force together. (*Billings* v. *United States*, 23 C. Cls. R., 166.)

The latter act, however, purports (with the exception aforesaid) to set out a complete scheme of jurisdiction. It is substantially a codification of the law so far as the jurisdiction of the Court of Claims is concerned. As remarked by Mr. Justice Bradley, in *United States* v. *Jones* (137 U. S., 1, 15–16), it "reenacted or revised the previous laws as to the jurisdiction of the Court of Claims." It is now to be regarded as "*the* act of Congress conferring jurisdiction upon the Court of Claims." (*German Bank* v. *United States*, 148 U. S., 573, 580.)

It will be noticed that the provision above cited from the Bowman Act, relating to departmental cases, included all claims "pending in any of the Executive Departments which may involve controverted questions of fact or law," and provided that "the court shall not enter judgment thereon, but shall report its findings," &c. It is difficult to perceive why this did not expressly repeal a prior provision that in certain classes of such cases judgment might be entered.

The Tucker Act in this regard is substantially the same as the Bowman Act, except that it requires the consent of the claimant for the transmission of the claim, and omits the ambiguous words "for its guidance and action," with which the provision of the Bowman Act terminates.

It will thus be perceived that the Tucker Act purports and intends to cover the whole ground of departmental

cases in particular as well as the whole ground of the court's jurisdiction in general.

This view is confirmed by the report of the conference committee of the House of Representatives, upon which report the present form of the act was accepted by the House. (Congressional Record, March 3, 1887, p. 2677.)

> The thirteenth section of the House bill, the twelfth of the proposed substitute, applies to all Departments, and *takes away the power of the Court of Claims to render judgment* in cases to be referred to that court by one of the Departments, and gives it power only to send its findings of fact and its conclusions of law to the Department.

It is proper to consider a formal report like this in ascertaining the construction of the statute (*Holy Trinity Church* v. *United States*, 143 U. S., 457, 464), although mere statements of individual members in debate would be incompetent.

The principle of implied repeal or rather abrogation, which we invoke, has been applied by this court in the somewhat similar case of its own appellate jurisdiction (*Murdock* v. *City of Memphis*, 20 U. S., 590, 617) and in the case of the removal act of 1887 (*Fisk* v. *Henarie*, 142 U. S., 459, 468). That the more specific character of the provisions of the Revised Statutes could not save them from abrogation by the codification of 1887 would follow from the principle applied in *Hubbard* v. *Soby*, 146 U. S., 56, to the specific provisions of the customs administrative act regarding appeals to this court. As to the general doctrine of abrogation by new provisions intended to

cover the ground completely, we may refer to *Norris* v. *Crocker*, 13 How., 429; *Pana* v. *Bowler*, 107 U. S., 529, 538; *Cook Co. National Bank* v. *United States*, 107 U. S., 445, 451; *District of Columbia* v. *Hutton*, 143 U. S., 18, 26–7; Endlich on Interpretation of Statutes, §§ 201, 241.

It is true that in *De Arnaud* v. *United States*, 151 U. S., 483, a case similar to the present, was reviewed by this court; but the defect in jurisdiction was not brought to the attention of the court, and hence its action in considering the merits is not a binding precedent, as was impliedly decided in *Chase* v. *United States*, 155 U. S., 489. (See cases cited at pp. 494–5; also *United States* v. *Gleeson*, 124 U. S., 255, 260.)

If any provision of § 1063 is still in existence it is that part relating to claims pending in the accounting offices; but that is not material here to consider, as the record shows no certificate from the Auditor or Comptroller.

IV.

Moreover, no appeal lies except from judgment or decree in a suit. (Tucker Act, § 9.) This is not a suit, but a mere claim. If it were a suit the statute of limitations would long since have run against it. (*Id.*, § 1.)

V.

Section 13 of the Tucker Act does not cover this case, but relates only to cases then pending, or to cases based upon the Bowman Act.

This appears by the clear language of the section, and is also confirmed by the report above referred to, to which on this point also we can refer upon the authority of the Holy Trinity Church Case:

> The fourteenth section of the House bill, the thirteenth of the Revised Statutes, gives power to the Court of Claims in cases referred to it under the Bowman Act, or now pending therein, to render judgment, when under this act the court is authorized to do so. The amendment, "or is now pending therein," makes a pending case proper for the operation of this act, though the six years' limitation prescribed by it would otherwise apply.

Respectfully submitted.

HOLMES CONRAD,
Solicitor General.
EDWARD B. WHITNEY,
Assistant Attorney General.
J. E. DODGE,
Assistant Attorney General.

FILED.
APR 8 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

No. 285.

THE UNITED STATES, APPELLANT,

against

THE STATE OF NEW YORK.

No. 422.

THE STATE OF NEW YORK, APPELLANT,

against

THE UNITED STATES.

Brief for the State of New York on Both Appeals.

DAVID B. HILL,
Of Counsel for the State of New York.

Supreme Court of the United States.

THE UNITED STATES, Appellant, against THE STATE OF NEW YORK.	*No.* 285.
THE STATE OF NEW YORK, Appellant, against THE UNITED STATES.	*No.* 422.

STATEMENT.

The United States and the State of New York have each appealed to this court from a judgment of the Court of Claims, entered June 8, 1891, in favor of the State of New York and against the United States, for $91,320.84; the State appealing because it claimed to recover $39,867.13 additional (in all, $131,187.97), which additional sum was disallowed.

The State presented its claim (for the full sum of $131,187.97) to the Treasury Department, as early as 1862, and it was transmitted to the Court of Claims for adjudication, under existing provisions of law, on January 3, 1889, which court duly heard the case and rendered judgment as above stated.

Briefly stated, the facts upon which the claim is based, are as follows: The State of New York, between April 23 and July 4, 1861, raised, equipped and sent to the war, thirty-eight regiments of New York troops, numbering 30,000 men, which were mustered into the military service of the United States, and of the "costs, charges and expenses" incurred thereby, there remains unpaid by the United States,

a distinct item of $131,187.97, which constitutes the claim in controversy.

The liability of the United States to reimburse the State for all the expenses incurred in the raising of such troops arises under an act entitled, "An act to indemnify the States for expenses incurred by them in defense of the United States," approved July 27, 1861 (12 Statutes at Large, 276), and also under a joint resolution, approved March 18, 1862, declaratory of the intent and meaning of such act.

The act of July 27, 1861, provides that, "The Secretary of the Treasury be and he is hereby directed, out of any money in the treasury not otherwise appropriated, to pay to the Governor of any State, or its duly authorized agents, the costs, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers, to be filed and passed upon by the proper accounting officers of the treasury."

The joint resolution of 1862, above mentioned, provides that,

"Whereas, Doubts have arisen as to the true intent and meaning of an act numbered eighteen, entitled, 'An act to indemnify the States for expenses incurred by them in defense of the United States,' approved July 27, 1861, be it

"Resolved, By the Senate and House of Representatives of the United States of America, in Congress assembled, that the said act shall be construed to apply to expenses incurred as well after as before the date of the approval thereof."

There is no dispute as to the *facts* respecting the claim.

When the troops aforesaid were required and furnished by the State of New York, there were no funds

in her treasury, out of which the expenses thereof could be paid, and under the Constitution and laws of the State, relating to the raising of money by taxation for such purposes, a tax of $3,000,000, or so much thereof as might be necessary for that purpose, which was immediately voted by the Legislature on the 15th day of April, 1861, could not reach the State treasury until the months of May and June, 1862, and some of it not until a later period.

The sum of $2,873,501 was required for immediate use in defraying such expenses, and that sum the State raised, in part, to wit: $1,250,000 by issuing revenue bonds or bonds in anticipation of the State tax for the public defense, bearing the legal rate of interest, seven per cent, payable quarterly, and the bonds were made payable on the 1st days of June and July, 1862, at which time it was expected the State tax would be collected and would be available for their payment.

The remainder of said sum of $2,873,501, to wit: $1,623,501 was borrowed from the Canal Fund of the State, by authority of the Commissioners of the Canal Fund, who had charge of its investment. This was a fund which, under the Constitution and laws of the State, was made up of an annual tax levied for that specific purpose, which tax, in 1861, amounted to something over two million dollars, and the Commissioners of the Canal Fund were required to immediately invest it for the benefit of what was known as the Canal Sinking Fund, which had been established for the purpose of providing the necessary funds to pay off the canal debt of the State at maturity, and these moneys could not be legally diverted to any other purpose.

The Commissioners of the Canal Fund, on May 21, 1861, authorized a loan out of this fund to the Comp-

troller, of a sum not exceeding two million dollars, at five per cent interest, for the purpose of enabling the Governor and other State officers having charge of the business of raising troops, to defray the expenses thereof, and it was pursuant to this resolution that the Comptroller used the sum of between $1,600,000 and $1,700,000, for that purpose, as above stated.

This sum was repaid to the Canal Fund, to the extent of $1,113,000, about the 1st of January, 1862, being the amount of money advanced by the Federal government to the State government, on account of such expenses; and the remainder, between $500,000 and $600,000, was repaid to the Canal Fund on April 4, 1862, out of the moneys realized from the collection of the State tax for the public defense.

The sum of $131,187.97, for which this claim is made, consists of the interest which was paid by the State upon its bonds issued in anticipation of the State taxes for the public defense, which interest amounted to the sum of $91,320.84, and of the sum of $39,867.13 paid into the Canal Fund as interest upon the moneys that had been borrowed from that fund.

The absolute necessity and propriety of these payments of interest are not questioned. It was the only way the State had to supply itself with immediate funds to promptly raise the troops required.

The Treasury Department doubted its authority to allow this claim, not upon the ground that the moneys had not been actually and necessarily expended for the purposes mentioned in the act of July 27, 1861, but that no "interest" of any kind, form or character could be allowed upon or included in demands against the United States, unless when expressly specified by statute, and that the act of

1861 made no *special* mention of interest when providing generally for the payment of "costs, charges and expenses."

The claim being pending in the Treasury Department, the Secretary, on January 3, 1889, under the authority of existing provisions of law, transmitted the same to the Court of Claims for hearing and adjudication, which court heard the claim and awarded *judgment* against the United States for a portion thereof, from which judgment both the general and State governments have appealed to this court.

The Solicitor General recently moved to dismiss the appeal of the State of New York, for the reason that determinations of the Court of Claims upon claims transmitted to it from departments, are not obligatory in character, and that no appeal therefrom lies to this court. The motion was not entertained, but the questions involved therein were reserved until this argument.

FIRST.

The appeals are properly before this court.

(1.) The Attorney-General having himself appealed to this court from the judgment in this very case, he is estopped from insisting that no appeal lies herein.

The ordinary principles of estoppel should apply in such a case.

Peck v. Burr, 10 N. Y. R., 294.

The State raises no question as to the right of either party to appeal, and if the Attorney-General is estopped from raising it, then this court can review

the judgment the same as it did in a precisely similar case, where neither side suggested the question.

De Arnaud v. United States, 151 U. S. R., 483.

(2.) The claim was transmitted to the Court of Claims under section 1063 of the Revised Statutes. That section is as follows:

"Whenever any claim is made against any executive department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any executive department, in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter or claim, of the character, amount or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: Provided, That no case shall be referred by any head of a department, unless it belongs to one of several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."

Under that section, the claim was duly heard and a *judgment* was actually rendered, from which each side has appealed under the authority of section 707 of the Revised Statutes, which is as follows:

"An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court."

It is conceded that the appeals are properly here, unless section 1063 of the Revised Statutes has been either expressly or impliedly repealed.

(a.) There is no *express* repeal.

The Bowman act (act of March 3, 1883) contains no repealing words whatever, and the Tucker act (act of March 3, 1887) contains no express repeal, but only repeals "all laws and parts of law *inconsistent* therewith." (Section 16.)

(b.) There is no *implied* repeal.

In the first place implied repeals are not favored in law. Neither will they be presumed.

Ex Parte Crow Dog, 109 U. S. R., 557.
Henderson's Tobacco, 11 Wallace, 652.

In the second place the acts of 1883 and 1887 are not *necessarily* inconsistent with section 1063 of the Revised Statutes. They all can stand together.

The Court of Claims, in a very well considered opinion, has so held, and the case may properly be considered as authority here.

Billings v. The United States, 23 Ct. of Claims R., 166.

A careful examination of these two acts tends to the conclusion that no repeal was intended.

As a matter of ready reference in this brief we insert the principal section in each of these two acts.

Section 2, chapter 116 of the Bowman act (1883) is as follows:

"That when a claim or matter is pending in any of the executive departments, which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted, for its guidance and action."

Section 12, chapter 359 of the Tucker act (1887) is as follows:

"That when any claim or matter may be pending in any of the executive departments, which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have beeen found, the court shall report its findings to the department by which it was transmitted."

It will be observed that the Bowman act, of itself, does not authorize any judgment to be entered, but on the other hand, expressly prohibits it. That act was intended to provide merely a means of investigation, as clearly appears from its title, which is as follows: "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government."

The claimant has nothing to do with its reference. It may be made without his consent. It may be made regardless of the amount of the claim.

The report of the Court of Claims when transmitted to the department, is "for its guidance and action."

The Tucker act only provides for the transmission of claims, "with the consent of the claimant." Whether the report of the findings is to be for the "guidance and action" of the department, or whether it is to be conclusive or what its effect is to be, is not expressly declared.

It will be observed that section 12 of this act, like the Bowman act, does not provide for a judgment, nor unlike the Bowman act, does it expressly prohibit one.

In the case of In re Sanborn (148 U. S. R., 222), no other decision was possible. The matter having been transmitted to the Court of Claims under the Tucker act, with the consent of the claimant, and that court having simply made its findings under section 12, *without any judgment having been entered*, there was nothing to appeal from and of course no appeal would lie to this court under such circumstances.

Besides, in that case there was *strictly* no claim against the United States for which any judgment could be rendered. The court said (page 227) that, "the claimant did not pretend that the government owed him anything for property sold or services rendered. His effort was to get the Department of the Interior, which was paying money over to Indians under treaties, to withhold from them an agreed percentage thereof for services rendered by him to the Indians."

That case is not authority for the contention that the Bowman act was repealed by the Tucker act, much less that the Tucker act repealed section 1063 of the Revised Statutes.

Section 13 of the Tucker act expressly recognizes the existence of the Bowman act and provides a certain procedure for cases arising thereunder; hence it could not have been intended to repeal the latter act.

But so far as our case is concerned, it is immaterial whether the Bowman act was repealed by the Tucker act or not; but it is sufficient that our claim was specifically transmitted under section 1063 of the Revised Statutes, and that that section remains in force.

(c.) Section 1063 of the Revised Statutes is still operative, because it is not absolutely or necessarily inconsistent with the Tucker act. They both can stand and be successfully administered.

Three sets of provisions or schemes of jurisdiction are in force, each distinct from the other, each independent of the other, and each different from the other, but each not necessarily conflicting with the other, and each can be enforced without friction or confusion.

First. Section 1063 provides for the transmission of any claim pending in the executive departments, *exceeding three thousand dollars in amount*, whether the claimant consents or not, and provides, after a hearing and decision, for the entering of a judgment thereon.

This section, taken in connection with sections 1064 and 1065, embraces only cases in which there is a claim for money, such as the Court of Claims may take jurisdiction of on the voluntary petition of the

claimant, and in which a judgment may be entered against the United States. All such claims less than three thousand dollars, are barred out and cannot be transmitted under *this* statute.

Second. Under the Bowman act (1883) any claim or *matter* pending in the executive departments, irrespective of the pecuniary amount involved or of the consent of the claimant, may be transmitted to the Court of Claims, which shall make findings thereon and report the same to the department "for its guidance and action," but the court shall not enter judgment thereon.

Third. Under the Tucker act (1887) any claim or matter pending in the executive departments, irrespective of the amount involved, may, *with the consent of the claimant*, be transmitted to the Court of Claims, which shall make findings thereon and transmit the same to the department. Section 12 of this act, which provides for the transmission, makes no provision for judgment and omits to declare the force and effect which the report shall have when it reaches the department.

It will thus be observed that a careful analysis of these three statutes shows that while different conditions are provided for, there are no conflicting directions.

In brief, the salient points of difference, but not of conflict, are that the first statute provides for transmission, hearing and *judgment* upon claims involving over $3,000, without the consent of the claimant being necessary; the second provides for transmission, hearing and *findings*, without judgment, and irrespective of amount involved and without consent of claimant; the third provides for cases exactly the

same as the second, except *that the consent of the claimant* to the transmission *is* required. The wisdom, the propriety, or the value of these discriminations is not a matter for the courts. It is sufficient that Congress has recognized and provided for them in all their various phases.

(d.) Section 13 of the Tucker act is a very important section and needs to be construed. It is as follows:

"That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled, 'An act to afford assistance and relief to Congress and the executive departments, in the investigation of claims and demands against the government,' approved March 3, 1883, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisons of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment, justice shall require, and report its proceedings thereon to either House of Congress or to the department by which the same was referred to said court."

In the foregoing discussion we have considered the Tucker act practically without reference to section 13, and as though it did not exist.

Its construction is not material to our case, except in the contingency that the court should hold that the Tucker act has abrogated or superseded section 1063 of the Revised Statutes.

It does provide for the entry of judgments in certain cases or upon certain conditions, or in certain contingencies. and the question arises, what are they?

It clearly recognizes the existence of the Bowman act (1883), and must be deemed to authorize judgments in every case, "which shall come" before the

court under that act, "or is *now* pending" in that court under that act, in case the court is satisfied upon the facts established, that it has jurisdiction to render judgment *under existing laws* or under this (the Tucker) act.

The Bowman act itself does not authorize any judgments upon claims transmitted thereunder, and the question presented is what state of facts must exist or what facts are necessary to be shown, to enable the Court of Claims to hold that it has jurisdiction to render judgments in such cases?

Although it must be conceded that this section (13) is somewhat ambiguous, and it is not easy to determine precisely when a judgment can properly be rendered thereunder, yet it may fairly be argued that the words, "if it shall appear to the satisfaction of the court, upon the *facts* established, that it has *jurisdiction* to render judgment thereon" should be construed to mean in substance that the court may render judgment in any case where the facts established show a liability against the United States which would be recognized or regarded as a valid claim, either "under existing laws" or under the Bowman act, or under the Tucker act.

The words, "under existing laws" would of course include claims under section 1063 of the Revised Statutes.

It follows that from any *judgment* authorized by this thirteenth section of the Tucker act, an appeal lies to this court, either under section 707 of the Revised Statutes, which allows appeals from *all judgments* of the Court of Claims, or under section 9 of the Tucker act.

The only ostensible and appropriate purpose of authorizing a judgment to be rendered, was to enable the decision to be reviewed. For every other purpose, "findings" alone would be amply sufficient.

In any view of the case, these appeals seem to be properly in this court and must be disposed of on their merits.

SECOND.

The United States became legally liable under the act of July 27, 1861, for the expenditures made by the State of New York for the purposes specified in said act.

We do not apprehend that the general liability of the United States, for whatever expenses were legitimately and properly incurred by the State under said act, is really doubted.

Even if disputed, there can be no serious question in regard to it.

It is laid down as an elementary principle that a government may, by laws duly enacted, enter into an obligation by which it will be bound in the same manner and to the same extent, as though it had by its duly constituted agents, entered into a written contract for the performance of the same obligations.

These statutory contracts are deemed the highest and most solemn form of governmental contracts, and they are invariably to be construed as contracts, and not as mere legislative enactments.

The following authorities are regarded as sustaining these propositions.

Huidekoper's Lessee v. Douglas, 3 Cranch R., 1.
State Bank v. Knoop, 16 How. U. S. R., 369.
Fletcher v. Peck, 6 Cranch R., 87.
New Jersey v. Wilson, 7 Cranch R., 166.
Dartmouth College Case, 4 Wheaton, 518.
Keith v. Clark, 97 U. S. R., 454.

Other authorities to the same import might be cited holding that where, by an act of the Legislature, anything is granted as a direct inducement or consideration for the expenditure or investment of money by the citizen, or to repay the citizen for moneys expended or services rendered for the benefit of, or in behalf of the government, the statute becomes a contract obligation protected by the constitutional guaranties to the same extent as a contract between private citizens, and to be governed by the same rules of construction and interpretation as private contracts.

Under the Constitution of the United States the several States were under no legal or moral obligation to respond to the President's call for troops *in the manner* in which they did. They performed a patriotic part, but not a constitutional or legal duty.

The duty of suppressing insurrections, or raising and supporting armies, and of providing for organizing, arming and disciplining the troops of the several State when called into service by the United States, devolves upon the general government, and not upon the States.

Constitution, art. 1, § 8, subs., 11, 14 and 15.

The act of July 27, 1861, constitutes a statutory contract of indemnity on the part of the United States with the several States furnishing troops, as therein specified, and obliges the general government to reimburse the States for the expenses incurred thereby.

Besides, the troops in question were furnished by the State of New York at the special request of the

United States authorities, and under an express promise of reimbursement of the expenses.

Findings of Fact, 11, 12, 13 and 14, Record, pages 9-10.

And in recognition of its liability for such expenses, the general government has, in fact, paid all (or nearly all) thereof, except the $131,187.97 now in dispute.

THIRD.

The interest paid by the State on its short time bonds, issued for the purpose of securing moneys immediately, is properly chargeable as a part of the "costs, charges and expenses" incurred under said act.

The State is not claiming to recover *interest*, as such, upon any claim which it has presented, but only interest which it was compelled to pay in borrowing moneys to raise troops, and which thereby became a part of the original *expenses* incurred. The term "interest" is a misnomer here. It is, when paid by the State, essentially *a cost*, incurred at the solicitation of the United States, in procuring supplies and services, and should be so denominated.

It is substantially conceded that the interest paid was a necessity. The State had no cash — moneys had to be obtained immediately — and moneys could only be obtained by borrowing, and paying interest; and hence when so paid, the interest became as much a part of the necessary and proper *expenses* incurred by the State, as was any other disbursement.

The United States, by reimbursing the State the sum paid by the State for principal and interest, does not pay interest upon claims against it in any other

sense than it pays interest on their funded debt and loans made by their authorized agents.

(a.) What was the contract obligation which the Federal government assumed when it enacted the law of 1861?

It can best be expressed in the language of the act itself, viz.: The payment to the State of New York of "the costs, charges and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying and transporting its troops employed in aiding to suppress the present insurrection against the United States," and by the declaratory resolution of 1862, this act was to apply to expenditures made or incurred after the passage of the act, as well as before.

It not only made this agreement, in the most solemn manner in which a government can enter into a contract, but as a pledge of its good faith, it also, in the same act, made a permanent, indefinite appropriation of a sufficient amount, from the public treasury, to enable it to keep the promise it had made. It would have been difficult for the law-making power to have used broader terms or more generic forms of expression. "Costs, charges and expenses properly incurred," would, as between individuals, be held to include everything which the obligee would be required to pay, in order to successfully accomplish the result specified by the obligor.

Troops could not be enrolled, equipped and mustered into the public service without the immediate expenditure of money. The State could not expend money which it did not have in its public treasury. It could, and it did, immediately provide for the levy of a tax upon its citizens to meet these expenditures, but the laws for the collection of taxes must be com-

plied with, and the machinery for their collection could not be moved and applied so speedily as to bring the money into the treasury in season for its use by the State, in enrolling and equipping and mustering in the troops called for by the Federal government.

It should be borne in mind that there was no delay on the part of the State, not only in responding to the call of her country in the hour of its great need, but there was also no delay in taking steps to provide the means to meet all the necessary expenditures which these unexpected calls for help involved.

On the next day after Fort Sumter was fired upon, the State Legislature passed a law imposing a tax upon all the taxable property of the State, for the purpose of meeting these expenditures. But action could not be delayed until this tax could be collected, and the State borrowed the money, *not for any long period of time*, but only in anticipation of the tax, and repaid it the moment sufficient taxes had been paid into the treasury to enable it to do so.

(b.) Under such circumstances, it is submitted that these moneys thus paid are just as truly a part of the necessary expenses properly incurred by the State, for the purposes specified in the act of 1861, as any other moneys which had been paid for that purpose.

Take the item of interest paid upon the bonds issued in anticipation of the State tax for the public defense, as an illustration.

By means of these bonds the sum of $1,250,000 was immediately raised in cash and paid out for the equipment of the Federal troops from the State of New York. This money was paid for clothing, for

guns and ammunition and other military equipments, and for the expenses of mustering in, etc.

Assume, *arguendo*, that the State of New York, having no money in its treasury for that purpose, instead of anticipating the collection of the State tax by the issue of interest-bearing bonds, had purchased these supplies and made these expenditures upon credit, agreeing to pay the parties when furnished the supplies and rendered the services, interest on sums that might be due them for supplies furnished or work performed, until the time when the State could realize the money from the State tax for the payment of these bills; can there be any doubt that in the eye of the law the interest paid on such bills would not have formed a part of the necessary expenses of the State, which the United States had agreed to reimburse it for?

The interest was necessarily paid, and whether it was paid to the persons of whom the purchases were made for the equipment of the troops, or whether it was paid to other persons for cash advances by them, which was used in making payment for such purposes, is entirely immaterial. It is within the terms of the contract in either case; and if not refunded to the State by the Federal government, the contract of the latter in this respect is broken and repudiated. The State of New York is willing to stand upon the contract which the government made with it, and upon the strength of which these moneys were paid out.

(c.) In the language of Judge William F. Allen, who was, at the time this claim was first presented to the Treasury Department, Comptroller of the State, and who had previously occupied a high judicial position, and who was afterwards one of the most illus-

trious of the judges of its Court of Appeals: "It would be a sufficient answer to say that the services performed and expenditures incurred were at the special request of the general government, and the act of Congress was intended, in good faith, as an act of indemnity, and that no narrow or restricted interpretation should be given to the terms employed, which would defeat the object and plain intent of the statute. It should have a liberal interpretation in favor of the creditor, to the extent necessary to give full indemnity. The just intent of Congress ought not to be defeated by a too literal interpretation of words. The interest paid was a necessity, and as much a part of the necessary and proper expenses incurred by the State as was any other disbursement. The United States, by reimbursing the State the sum paid by the State for principal and interest, does not pay interest upon claims against it in any other sense than it pays interest on their funded debt and loans made by their authorized agents. The State was not a volunteer, in the sense of thrusting its aid, unasked, upon the general government, but was a volunteer in the sense of cheerfully aiding the general government, upon request, with her credit and means, to the extent called for by the emergency. In substance, it was the borrowing of so much money by the United States, through the agency of the State of New York, and upon the credit of the latter at the usual rate of interest, the whole of which was paid by the agent and *quasi* surety for the principal; and as the latter received the full benefit of the transaction and recognizes the liability to pay the principal, no part of the transaction can be repudiated, but interest as well as principal, should be paid by the party for whom the loan was made."

And further commenting upon the fact that the State had no resources for the payment of these expenditures, except by a resort to taxation, which was had, and a tax levied and collected and paid into the treasury in the ordinary course, he says: "And as soon as the laws of the State permitted, and from the money thus raised, the debt was paid, including the interest, which was really a part of the debt, and a part of the expense incurred by the State as early as the 1st of July, 1862." (See pages 48-49 of evidence for claimant before Court of Claims.)

(d.) In construing this act, the circumstances under which it was passed are also to be taken into consideration in determining the legislative intent. The emergency was great; the life of the nation was in peril; troops were imperatively and promptly required; the Federal treasury was empty; the State treasury was also empty, and, under the Constitution and laws of New York, whatever money was in the treasury was there specifically appropriated for particular objects, and no part of it could be used for any other purpose. The Federal government beseeches the State government to send it troops, and, in substance, says: "We will reimburse you for all proper expenses incurred in our behalf."

All of these things were either matters of public contemporaneous history, or were contained in the Constitution and public statutes of the State, and were presumably well known to Congress when they passed the act in question, and it must have been contemplated that the State would, for the time being, make use of its own credit for the purpose of raising money to immediately provide the necessary troops for the public defense, and that whatever might be paid out by the State for the use of money so raised

would be deemed a part of its expenses incurred for the benefit of, and at the request of the general government.

(e.) It has been repeatedly held that, in construing an act of Congress or a State law, the courts may properly refer to the history of the times and the situation of the people when it was passed, in order to determine the meaning and intent of its provisions.

Preston v. Browder, 1 Wheat. U. S., 115.
U. S. v. Union Pacific R. R. Co., 91 U. S., 72.
Katzenberger v. Aberdeen, 16 Federal Rep., 745.
Nash v. Towne, 5 Wall., 699.

So, also, the title of an act may be referred to for the purpose of aiding the court in determining what was in the mind of the Legislature at the time of its passage.

U. S. v. Palmer, 3 Wheaton, 610.
U. S. v. Fisher, 2 Cranch, 358.
Hadden v. Collector, 5 Wall., 107.
Wilson v. Spaulding, 19 Federal Rep., 304.
Myer v. Car Co., 102 U. S., 12.

(f.) If we refer to the title of the act of 1861, we will find that the intent of Congress, as expressed by the title, is very clear, and that it was intended to include all expenses incurred by the State in defense of the United States. It reads: "An act to indemnify the States for expenses incurred by them in defense of the United States."

The word "indemnify" has both a present and a future meaning. It means, either: "1. To save harmless; to secure against future loss or damages;"

or "2. To make up for that which is past; to make good; to reimburse." (Wesbter's Dictionary.)

The object of this act, as expressed in the title, will not be satisfied by a partial reimbursement of the expenses incurred by the States for the purposes indicated in the act. The words employed in the act itself, viz.: "Costs, charges and expenses" for which reimbursement is to be made, embrace the expenditure which is the foundation of this claim. The terms "costs" and "charges" there used, are probably included in the term "expenses," which is the plural of "expense," which is defined to be either; "1. The act of expending, laying out or consuming by using; disbursement; outlay; consumption;" or "2. That which is expended, laid out or consumed; cost; outlay; charge; as the expenses of war." (Id.)

The term has been defined in various decisions of the courts.

(g.) In Sullivan v. Triumph Mining Company (39 Cal., 459), it was held that a liability incurred is an expense.

In Foster v. Goddard (1 Cliff., 158; affirmed in 1 Black, 506), it was held that the terms "actual expenses that may appertain to the goods themselves," when referring to the trade of a partnership, included the expenses of clerk hire, advertising and taxes.

In Dashiel v. Mayor, etc., of Baltimore (46 Md., 615), under a statute authorizing the expenses of paving an unpaved street, to be assessed upon the owners of adjoining property, it was held that the charges for establishing the grade, for advertising and surveying, as also a reasonable commission for collecting the tax, were included within the term expenses.

The term has also received a construction by the Court of Claims in a case other than the present, to wit, in the case of Dunwoodie v. The United States (22 Court of Claims, 269), which is in accordance with the views contended for by the plaintiff in this case. It was there held that, "when Congress appropriates money to pay expenses, they must be assumed to mean those expenses which are necessarily incident to the work they direct to be done."

By the act of July 27, 1861, Congress appropriated money to pay the expenses of the State of New York in raising, enrolling, equipping and mustering in these troops, and it must be held that Congress meant those expenses which were necessarily incident to the work to be done. As we have seen, these expenditures for interest upon bonds issued in anticipation of the State tax, were necessarily incident to the work which the State undertook by authority of Congress to do.

(h.) There is another familiar rule of statutory construction which should be observed in the application of this act of 1861, and it is that "what is implied in a statute is as much a part of it as what is expressed."

U. S. v. Babbitt, 1 Black, 55, 61.

And the opinion of the court in that respect in this case has been quoted with great emphasis in many subsequent decisions of this court.

Gelpcke v. City of Dubuque, 1 Wall., 221.
Croxall v. Sherrard, 5 id., 288.
U. S. v. Hodson, 10 id., 406.
Telegraph Company v. Eiser, 19 id., 427.
Bulkley v. U. S., 19 id., 40.

In the latter case, the court say: "What is implied in a contract, deed or statute, is as effectual as what is expressed. Human affairs are largely conducted on the principle of implication."

In United States v. McKee and others (91 U. S., 442), the United States had assumed the payment of "the necessary and reasonable expenses" which any State had incurred during the Revolutionary war, in subduing any British post, or in maintaining forts or garrisons within and for the defense, or in acquiring any part of the territory that might be ceded or relinquished to the United States, and had authorized the reimbursement of all such expenses. A private citizen of Virginia had advanced out of his own funds the sum of $8,616, by authority of the State of Virginia, in expelling the British forces from the territory of the north-west, and the State authorities having recognized his claim to that amount, with interest, both the Court of Claims (10 Court of Claims, 231) and this court, held that the interest, as well as the principal, should be reimbursed.

It is true that in the act referring the case to the Court of Claims, it provided that the Court of Claims in the adjustment and settlement of the claim, should be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases, and both that court and this court held that, so far as there had been any rules and regulations adopted by the United States in the settlement of like cases, they authorized the allowance of interest.

FOURTH.

The practice of the executive departments of the government, prior to the act of 1861, was in favor of the allowance of interest paid by States or individuals for the benefit of the United States.

It seems to have been the universal custom of the executive departments, long before the act of 1861, upon the settlement of claims and accounts for reimbursement of expenses paid by States or individuals, for the use or for the benefit of the United States, to allow the claimant whatever sums he may have actually paid out for interest on moneys raised or used for the benefit of the United States not by way of interest, upon any claim that the State or the citizen might have against the general government, but as a part of the expenses actually incurred and paid by claimant, and for which reimbursement should be made by the United States.

(1.) The question arose very early in the history of the government, under the act approved April 18, 1814 (6 Statutes at Large, Private Laws, p. 139), which enacted, "That the Secretary of State be and he is hereby directed to liquidate, according to the principles of justice and equity, all the claims of the inhabitants of the late province of West Florida, now included within the limits of the State of Lousiana, or of Mississippi territory, for advances by them made for the use and benefit of the United States prior to and since the taking possession of the said late province of West Florida by the United States."

Under this act the State Department allowed interest for advances made for the use and benefit of the United States, as appears from the act of Congress, passed April 9, 1819 (3 Statutes at Large, 422),

and the act passed April 11, 1820 (Id., 560; 5th Opinions of the Attorney-General, p. 108.)

(2.) Similar claims, under statutes not so broad in their terms as the act of 1861, were allowed and paid by the Treasury Department for the expenses of furnishing troops in the Florida war of 1838 and 1839.

By an act passed August 23, 1842 (5th Statutes at Large, 522), the proper accounting officers were authorized to adjust the claims of certain officers and companies of militia, for pay for services in that war.

By an act passed August 31, 1842 (Id., 578), the former act was made applicable "to the settlement of any claims for subsistence furnished to the Florida militia in 1839 and 1840, not heretofore settled."

By an act passed March 3, 1843 (Id., 628), the accounting officers were authorized to settle the claims for supplies furnished the Florida militia, upon principles of equity and justice.

By a joint resolution of April 30, 1844 (Id., 716), the accounting officers were directed, in settling for supplies furnished to militia in the service of the United States, under the foregoing acts, to discharge the claims in the following order, to wit:

(First.) The amounts due to individual claimants, and

(Second.) Those due to the territory of Florida.

By a joint resolution of March 1, 1845 (Id., 797), it was declared that nothing in the foregoing acts or resolutions should be understood or construed to prevent the Secretary of War from allowing or paying any just or equitable claim for supplies furnished, or advances or loans made, to provide for the defense of the inhabitants and suppression of Indian hostilities in the territory of Florida, provided the amounts

allowed and paid shall not exceed the appropriations already made.

By an act approved February 27, 1851 (9th id., 571), there was a further appropriation made of $75,000 to supply a deficiency on account of claims yet to be discharged, under the head of preventing and suppressing Indian hostilities in Florida.

It will be seen by reference to the opinion of the Attorney-General of the United States, in a letter addressed by him to the Secretary of War, that the Treasury Department had allowed and paid under these several acts, the sum of $95,588.63, a part of which consisted in the payment of bonds issued by the territory of Florida for the purpose of raising money to defray the expenses of the territorial militia in the war of 1838 and 1839, and that these bonds, to the full amount, principal and interest, were allowed and paid by the Treasury Department. (5th Opinions of Attorney-General, 460.)

There was nothing in any of these acts which expressly provided for the reimbursement of interest paid or incurred by the territory of Florida, in borrowing money for the purpose of defraying the expenses of her militia. In some of them the claims were to be adjusted upon principles of justice and equity, words, however, which added nothing to the force of the enactment, and in the joint resolution of March 1, 1845, relating to the reimbursement for advances and loans, these words do not appear.

Certainly, the act of 1861, which declares that reimbursement shall be made for "all costs, charges and expenses," is more comprehensive and confers upon the accounting officers greater authority than any of these Florida acts.

(A.)

The precise point involved in this claim was decided favorably to the claimant, by the Treasury Department, in a case reported in the first volume of the Digest of Second Comptroller's Decisions, at page 137, referring to volume 15 of the Office Records. The proposition, as formulated by the Comptroller himself, is as follows:

"Interest can in no case be allowed by the accounting officers upon claims against the government, either in favor of a State or an individual. But in cases where the claimant has been compelled to pay interest for the benefit of the government, it then becomes a part of the principal of his claim, and as such is allowable. Such is the case of a State which has been obliged to raise money upon interest for the suppression of hostilities against which the United States should protect her. In such cases the amount of interest actually and necessarily paid, will be allowed, without reference to the rate of it."

As the case was twice before the Comptroller, and was very fully considered by him and his decision approved by the Secretary of the Treasury, and is directly in point upon the question involved in this case, we deem it important to submit a copy of the decision, which is herewith given:

(Vol. 15 of Office Records, pp. 32-35.)

TREASURY DEPARTMENT,

Second Comptroller's Office,

Washington, D. C., Nov. 1, 1851.

P. Clayton, Esq., Second Auditor:

Sir.— I return herewith the statement and papers transmitted from your office relative to the claim of

the State of Florida for reimbursement under the act of 27th February, 1851. (Statutes at Large, vol. 6, p. 573.)

The claimants having demanded a revision of the decision disallowing interest upon this claim, I have carefully examined the question, and am of the opinion that interest at the rate of six (6) per cent per annum should be allowed on the amount found due from the date of the payment made by the State, and now reimbursed up to the present time.

It has been the general rule of the Treasury Department not to allow interest upon any claim against the United States, for the reason that the government is supposed to be always ready to pay any just claims, and no interest can thereafter accrue on any such, save by the neglect of the claimant to present them. Upon this practice it is not designed by this decision in any wise to infringe. But it appears in the present case that the State of Florida was compelled to borrow the money with which these expenses were defrayed, and has continually paid, or is under contract to pay, all the interest demanded of the government.

This interest, therefore, is not claimed as compensation for delay of payment, or for the use of the money advanced from the treasury of the State, upon neither of which grounds could it be admitted, but constituted a part of the original and necessary expenditure incurred by the State and by the act directed to be reimbursed, and comes, therefore, as fully as any other item, not only within the obvious intent of the enactment, but within its terms, "expenses incurred and obligations contracted."

The principle applicable to this case is very distinctly stated by Attorney-General Wirt, in an opinion given upon a similar claim by the State of Virginia. (Opinions of Attorney-General, p. 342.) He remarks: "The principle is this: The United States are bound by the relation which subsists between the general and State governments, to provide the means of carrying on war, and, as a part of the business of war, to provide for the defense of the several States. When the United States fail to make

such provision, and the States have to defend themselves by means of their own resources, the expenditure thus incurred forms a debt against the United States which they are bound to reimburse. If the expenditures made for such purpose are supplied from the treasury of the States, the United States reimburse the principal, without interest; but if, being itself unable, from the condition of its own finances, to meet the emergency, such State has been obliged to borrow money for the purpose, and thus to incur a debt on which she herself has had to pay interest, such debt is essentially a debt due by the United States, and both the principal and interest are to be paid by the United States. So that whenever a State has had to pay interest by reason of her taking the place of the United States in time of war, such interest forms a just charge against the United States."

Attorney-General Berrien recognizes the same principle. (Opinions of Attorney-General, p. 794.) He says: "The ordinary cases of claims against the government, which, however, undoubted, are not payable until demanded, and then without interest, unless the claimant shall have paid interest, in which case, indeed interest becomes strictly a portion of the principal of his claim."

And this is the rule which has always been adopted by Congress.

It is true, as suggested by the Second Auditor, that interest paid by States under such circumstances has generally been repaid by Congress by special enactment, and has not been allowed, under the general terms of reimbursing acts like the present. But these enactments may, with more propriety, be regarded as declaratory of the intention of Congress, that such interest should have been allowed under the original acts providing for reimbursements, than as recognizing such a construction of them as would exclude it.

And certainly, if the present claim is fully within the general rule which those very enactments have helped to establish, and can be brought fairly within the terms of the act making this appropriation, there

seems to be no good reason for requiring another act before it can be allowed.

It is proper to add that the Secretary of the Treasury (to whose notice I have brought this question), concurs in these views, and that they are also sustained by a very recent opinion of the Attorney-General in an analogous case.

* * * * * *

I am sir, etc.,

(Signed.) E. J. PHELPS,
Comptroller.

(Vol. 37, pp. 279-280.)

TREASURY DEPARTMENT.

Second Comptroller's Office,

Washington, D. C., May 11, 1852.

Decision on "Additional Report," etc., accounts of State of Florida, dated 6th April, 1852, under "Act for reimbursing said State for moneys advanced," etc. Approved 27th February, 1851.

I concur in the conclusions of the foregoing report, except as to the rate of interest.

* * * * * *

It is to be observed that the interest paid by the State upon these loans is not *allowed as interest*.

If such were the case, no more than six per cent could be paid under any circumstances. But it is allowed as having constituted a part of the principal of her claim under the law for her relief. The same principal, therefore, that authorizes the payment of interest, extends to the whole amount paid, provided that amount was in accordance with the laws of the place of contract, and was necessary in order to obtain the money. I think, therefore, that the facts now presented justify the allowance of seven per cent to the extent to which it was actually paid by the State, commencing, of course, as in the present computation, only from the period of its expenditure; and, as the proceeds of the property sold should be applied

to reduce the loan bearing the greater rate of interest, the same rate should be chargeable upon those proceeds.

E. J. PHELPS,
Compt.

J. S. GALLAGHER,
ThirdAuditor.

(B.)

We also desire to call the attention of the court to the principle laid down by the Second Comptroller in the claim of the State of Maine, which will be found in the Digest of Decisions of the Second Comptroller, edition of 1865, pages 32 and 33, section 219, as follows: "The claim of the State of Maine for organizing a regiment for the Mexican war, was allowed, with interest, from date of payment by the State to date of reimbursement by the United States, and this, on the ground of usage.

(Vol. 22 of Office Records, pp. 414-415.)

(C.)

In support of our contention that the act of July 27, 1861, authorizes the payment of moneys necessarily paid by the State for the purposes specified in that act, the attention of the court is invited to the decision of the Second Comptroller, reported at page 58, section 408, of the edition of 1869, and which is stated in the following language: "Where an unusual demand had exhausted the market, and prices rose higher than the rates prescribed by the regulations, and a delay to furnish troops until the needed equipments could be found in other markets at regulation prices, might have been disastrous, and the States proceeded to buy them at once on the best attainable terms, there being no reason to suspect combination between buyers and sellers to increase

the prices; *Held*, That the State may be reimbursed at the prices paid, even if higher than those fixed by the regulations."

(D.)

A reference to the opinions of the Attorney-General of the United States, which are cited by counsel for the United States in their brief, will disclose the fact that in every case the opinion quoted had reference exclusively to the question whether interest could be allowed upon the claim of an individual or a State against the United States. Not one of them had any reference to the case of a claim for moneys paid out by a State or an individual by way of interest upon loans made for the use or benefit of the United States, or to the question whether such payments were not a part of the necessary expenses of a State or individual, and to be allowed as a part of such expenses under an act of Congress authorizing reimbursement to be made for expenses incurred at the request of or for the use or benefit of the United States.

(E.)

The Secretary of the Treasury (then the Hon. Salmon P. Chase), on July 29, 1861, two days after the passage of the act in question, placed the same construction upon the act as that for which the claimant now contends, in an official letter to the Auditor of the State of Ohio.

It appears from the correspondence that the State of Ohio anticipated that in raising money upon her bonds to defray military expenses, she might have to allow a discount for cash, and the Auditor of the State, desiring information as to what would be allowed in the way of expenses incurred by the State, the Secretary wrote in reply: "As to the 'double

discount' of which you speak, if Ohio raises money by loan at a discount, the United States cannot refund such discount to the State, but only the amount of the debt, with interest, unless Congress provide otherwise." (Printed Official Report for 1861.)

Prior to the action of the Treasury Department, in the case of the State claims arising under the act of 1861, we have been unable to find any case reported or alluded to where any executive department having jurisdiction and authority to pass upon the claim, has refused to allow the claim of a State or any individual for interest paid upon moneys advanced or loans made for the use and benefit of the United States.

While the executive departments have consistently refused to allow interest upon claims against the government, they have just as consistently and uniformally allowed claimants for moneys paid by them as interest upon loans or advances made for the use and benefit of the United States, upon the ground that such allowance was not an allowance of interest upon a claim against the government, but upon the ground that moneys so paid constituted a just and legal claim against the United States, and were allowed as a part of such claim.

FIFTH.

The decisions of the Department of Justice sustain our contention.

The Department of Justice of the United States has uniformly held, in a long series of opinions, that payments made or expenditures incurred by the States, or by individuals, for interest upon loans or advances made for the use and benefit of the United States, constitute a just and legal claim against the

Federal government, and can properly be allowed by the accounting officers having jurisdiction to settle the accounts and claims presented wherein such expenditures appear.

(1.) Hon. William Wirt, Attorney-General, on June 6, 1825 (1 Opinion, 542), in the case of the claim of the State of Virginia, "for interest upon loans or moneys borrowed and actually expended by her for the use or benefit of the United States during the late war with Great Britain," under an act of Congress (4 Statutes at Large, page 132), says: "In construing this law, it is proper to advert to the principle on which it was founded, and to the object which it proposes to affect. The principle is this: The United States are bound by the relation which subsists between the general and State governments, to provide the means of carrying on war, and, as a part of the business of war, to provide for the defense of the several States. When the United States fails to make such provision, and the States have to defend themselves by means of their own resources, the expenditure thus incurred forms a debt against the United States which they are bound to reimburse. If the expenditures made for such purpose are supplied from the treasury of the States, the United States reimburse the principal without interest; but if, being itself unable, from the condition of its own finances, to meet the emergency, such State has been obliged to borrow money for the purpose, and thus to incur a debt on which she herself has had to pay interest, such debt is essentially a debt due by the United States, and both the principal and interest are to be paid by the United States. So that whenever a State has had to pay interest by reason of her taking the place of the United States in time of war,

such interest forms a just charge against the United States. If a State borrows the money at once, on the first occurrence of the emergency, and expends the specific money so borrowed, both the borrowing and the expenditure being *flagrante bello*, there seems to be no doubt that the claim, both for the principal and the interest, which she should have paid upon such loan, would be a fair charge against the United States on the principle of this law."

(2.) The same Attorney-General, on May 17, 1826 (1st Opinions, 568), in construing an award made by the Russian Emperor, in a controversy between the United States and Great Britain, for property taken by the latter during the war of 1812, which belonged to citizens of the United States, and which award decided that the United States were entitled to just indemnification for the property taken, held that the United States were entitled to interest upon the value of the property from the time it was taken. He so held, without placing any stress upon the word "just," as used in the award, and was emphatically of the opinion that the word "indemnification" of itself, imperatively required the allowance and payment of interest; that there could be no such thing as a complete indemnity without its payment.

(3.) See, also, the opinion of Hon. R. B. Taney, Attorney-General, on September 21, 1831 (2 Attorney-Generals Opinions, 841), in the case of the claim of Major Tharp.

Also, see the opinion of Hon. Isaac Toucey, Attorney-General, in a letter to the Secretary of the Treasury, February 16, 1849. (5th Opinions, 71.)

See Hon. Reverdy Johnson's opinion. (5th Attorney-Generals Opinions, 108.)

(4.) Hon John J. Crittenden, Attorney-General, in a letter to the Secretary of War, November 17, 1851 (5th Opinions, 463-464), in construing the act of February 27, 1851 (9th Statutes, 573), which appropriated $75,000 for reimbursing to the State of Florida, moneys advanced, expenses incurred, and obligations contracted for supplies, subsistences and services of the local troops called into service during the year 1849, at page 463, says: "The act of 27th of February, 1851, is intended to indemnify the State against loss or damage. Reimbursing means repairing a loss or an expense by an equivalent. If the State of Florida has contracted obligations bearing interest, or has paid money with interest, to the use and benefit of the United States, in necessary and proper supplies for the troops called into service in 1849, to refund to Florida the principal sum only, without the interest, would not reimburse the State—would save the State from loss or damage; would not be an equivalent for the expense the State has incurred for the United States."

(5.) Hon. Benjamin Harris Brewster, Attorney-General, in construing this very act of 1861, in a letter to the Secretary of the Treasury dated July 23, 1883 (at pages 50 to 53 of the printed case used before the Court of Claims), concedes that this claim is a just charge against the United States. At page 52, he uses this emphatic language: "Undoubtedly, the interest paid by the State of New York on moneys borrowed and applied to the object specified in the act of July 27, 1861, forms a part of the burden borne by that State for the general public defense, and constitutes a just charge against the United States."

It is true that he reaches the conclusion that the Treasury Department should not allow the claim, but

after having held that these moneys paid by the State and applied to the objects specified in the act of July 27, 1861, formed a part of the burden borne by the State for the general public defense, and were a just charge against the United States, we submit, with all due respect to the distinguished source from which this opinion emanated, that his conclusion is a *non sequitor*.

He seems to put it upon the ground that it had not been the practice of the executive departments to allow such claims; but in this respect he misapprehended the practice of the departments.

As we have already seen, it had been the uniform practice of the departments to pay claims of this character. On the other hand, it had been the uniform practice of the departments to refuse to allow interest upon moneys which were in the treasury of the State, and which had been used by the State for the benefit of the United States.

The learned Attorney-General confounded the two classes of cases, viz., where the State was compelled to borrow the money for the benefit of the United States, and pay interest upon the money so borrowed; and where the State paid out money in its treasury for the benefit of the United States, and sought to charge interest for it. In the former case, the executive departments have uniformly allowed the interest paid upon the moneys borrowed, not as interest, but as a part of the just claim of the State against the United States; and in the latter class of cases, they have uniformly disallowed it.

SIXTH.

The statute of 1861 was enacted in view of these decisions of the executive departments and it should be construed in harmony therewith.

Congress is presumed to have enacted the statute of 1861, in view of the decisions and opinions of the executive departments with reference to the construction and application of such laws; and if there is any ambiguity or doubt with reference to the true construction of the act of 1861, the prior decisions and opinions of the executive departments should have a controlling weight and the law should be construed in harmony with such decisions and opinions.

U. S. v. Hill, 120 U. S., 169.
U. S. v. Philbrick, Id., 52.
Brown v. U. S., 113 U. S., 568.
Hahn v. U. S., 107 U. S., 402, 406.
U. S. v. Pugh, 99 U. S., 265, 269.
U. S. v. Moore, 95 U. S., 760, 763.

There are many other cases to the same effect.

The departmental decisions which we have referred to in the foregoing brief comprise the action of four great departments of the government, to wit: The State, the Treasury, the War and the Law Departments; and they had all repeatedly held, prior to 1861, that where Congress authorized reimbursements to be made to a State, or to an individual, for expenses incurred in the public defense, or for the use or benefit of the United States, that such a law authorized the accounting officers to allow, as a part of such expenses, any moneys actually paid by the claimant for interest upon moneys borrowed or advanced for such purposes; but that it did not

authorize the accounting officers to allow interest upon moneys paid out of the treasury of the State for such purposes.

Whenever it was sought to obtain the payment of interest upon moneys expended, which were in the State treasury, Congress has been invoked, and special legislation obtained, for that purpose. But where there was no money in the State treasury which could be lawfully used for such purposes, and the State was compelled to borrow for the use and benefit of the United States, and pay interest upon the moneys so borrowed, no special legislation was required.

This departmental construction of such laws became as much a part of the law of 1861 as if it had been expressly incorporated in it, and will be respected and adopted by the courts in construing and applying the act of 1861.

SEVENTH.

The United States is liable for the expenses in question, irrespective of the act of 1861.

Independently of the act of 1861, the United States is liable for the expenditures upon which this claim is founded, for the reason that such expenditures were made at the request, or by the direction, of the heads of executive departments, and for the purpose of maintaining the executive authority of the government; and the Governor of New York, in making or authorizing the expenditures, was acting as the agent of the Federal Government, and by virtue of his authority as a Major-General of Volunteers in the military service of the United States.

The executive departments of the government are the authorized mediums through which the President, as the chief executive officer, acts, and their orders and directions, within the limits of lawful authority, are to be deemed the acts of the President himself.

It was the duty of the chief executive to see that the laws of the United States were enforced and obeyed, and any rebellion against its authority suppressed, and to protect the several States against invasion.

Any expenditure which he might authorize or incur for such a purpose, not forbidden by law, would be a lawful claim against the government, which the accounting officers of the Treasury Department would have jurisdistion to audit and adjust. (R. S., § 277.)

Besides the general calls and proclamations of the President, addressed to the Governors and the people of the several States, for troops to aid in the suppression of the Rebellion, we have in this case a special personal request, made by the President through the Secretaries of State and of War, to the Governor of the State of New York, requesting the State to furnish these troops; to supply them with arms, ammunition, clothing, subsistence and other equipments, and assuring the Governor that the United States would pay all expenses incurred by the State in that behalf.

On June 27, 1861, Mr. Seward, Secretary of State, in a telegram to Governor Morgan, was profuse in his "thanks to the State and to her loyal and efficient Governor," whom he characterized as a "worthy successor of the patriot, Tompkins, Governor in the War of 1812," and for the timely and generous aid which the State had rendered to the Federal government, and with a pride which was pardonable in a

native of the State, he says: "New York is the theme of every tongue in Washington;" and that if they needed more forces they would know where to look for them.

In a telegram dated July 5, 1861, to the Governor, Secretary Seward says: Buy arms and equipments as fast as you can; we pay all."

Again July 27, 1861, he telegraphs the Governor that the Secretary of War and Adjutant-General authorize him to say that the Governor will be expected to organize and forward the troops as fast as possible, and commission the officers. "Treasury notes for part advances will be furnished on your call for them."

August 16, 1861, Secretary Cameron telegraphed to Governor Morgan: "Adopt such measures as may be necessary to fill up your regiments as rapidly as possible; we need the men."

February 11, 1862, Secretary Stanton telegraphed the Governor: The government will refund the State for advances for troops as speedily as it can obtain funds for that purpose."

September 28, 1861, Governor Morgan was made a Major-General. A military department, called the Department of New York, was created, and he was placed in command, and all officers of the army serving within the limits of the department were required to report to him.

Previously, on September 5, 1861, the War Department had issued an order directing all persons having received authority to raise volunteer batteries, regiments or companies in the State to immediately report to the Governor the state of their respective organizations, and they and their commands were placed under the orders of the Governor, who was directed

to reorganize them and prepare them for service in the manner he might judge most advantageous for the interest of the general government.

Here was authority broad enough to authorize any expenditure which might be necessary on the part of the State to raise and equip and put in the field the regiments of troops which were furnished in 1861, and it would seem to be beyond question that the general government, without any legislation such as the act of July 27, 1861, became bound to reimburse the State of New York for the expenditures thus paid or incurred.

That the United States was thus bound, morally and as a matter of good faith, is plain, and that she was thus bound legally is equally clear.

In view of the circumstances, in which the general government was placed, and in which the State found itself, it must be admitted that the expenditures for which reimbursement is claimed in this action were necessary. There has not as yet been even a suggestion that the State of New York could have in any other way responded to these urgent requests of the general government, except by anticipating her State tax, by borrowing money and paying interest thereon.

EIGHTH.

The allowance of this claim is not prohibited by section 1091 of the Revised Statutes of the United States, nor by the rule adopted by the general government, that interest shall not be paid upon claims against it.

The State of New York does not ask nor seek to recover in this action any interest upon any claim which it has against the general government.

This is an important distinction, to be constantly borne in mind in considering this case, and the failure to observe this distinction led the accounting officers into error.

There is not a dollar of this claim which represents interest upon any money paid out of her treasury to meet the expenses of raising and equipping troops for the Federal service.

Subsequent to 1861 millions of dollars were thus paid by this State out of the funds in her treasury raised by taxation, and which were not refunded under the act of 1861 until months, and in some cases years, after they were made. Upon such expenditures no interest is here claimed, although, equitably, the general government should have paid interest, for the reason that payment was deferred for want of funds and for its convenience.

The rule that interest will not be allowed upon claims against the government is based upon the assumption that the government is always able and ready to pay; but during the War of the Rebellion it is a fact of history that the government was not able and ready to pay, and the reason of the rule failing, the rule itself should fail.

But we do not seek to disturb the rule, or to bring this claim within any exception to it.

The claim of the State rests upon a broader foundation. It only seeks reimbursement for moneys actually paid by it for the use and benefit of the United States, and which the latter has pledged its faith in the most deliberate and solemn manner to repay.

If the Federal government itself had enlisted, armed and equipped these troops, it would have been

compelled to have borrowed the money upon its own credit for that purpose, and have paid interest thereon.

When, at its request, the State of New York borrows the money for the same purpose and pays the interest upon it, upon what principle of law or justice or equity can it be claimed that the general government is not under a contract obligation to repay it?

If, at the request of the general government, the State of New York should pay the interest upon the public debt, or any part of it, would it be contended for a moment that the State was not entitled to immediate reimbursement by the Treasury Department out of the permanent appropriation for the payment of interest upon the public debt, and that the proper accounting officers should not settle and adjust the account of the State for such payments?

In the present case, the United States requested the State of New York to raise this money and equip these troops, and promised to make full indemnity for all expenses paid by the State in doing so, and set apart sufficient funds in the treasury to make the promise good, and authorized the accounting officers to settle and adjust the accounts of the State for such expenses, in order that they might be paid, and the right of the State to reimbursement is just as clear in the one instance as in the other.

It should also be borne in mind that the State of New York did not issue bonds having a long period of time to run, and that they are not seeking the repayment of interest upon that class of bonds which may have been issued for the purpose of relieving the citizens of the State from the burden of immediate taxation. On the day after hostilities were begun, the Legislature ordered a tax to be levied for the purpose of raising the money to meet these expendi-

tures, and the interest paid was *only for the short period of time which must necessarily intervene between the levy of such a tax and the payment of the money into the State treasury upon its collection.* The bonds were not issued, the money was not borrowed, the interest was not paid, to relieve her own people, but simply to enable the general government to immediately put in the field the troops needed for the public defense.

The act of Congress, as well as every principle of fair dealing between the United States and the State of New York, requires the repayment of these moneys thus expended.

Upon the Appeal of the State of New York.

ASSIGNMENT OF ERRORS.

1. The Court of Claims erred in holding that the State was not entitled to recover interest upon the moneys of the Canal Fund which it used in 1861 for the purposes specified in the act of July 27, 1861.

2. The said court erred in holding that, although the State actually paid the sum of $39,867.13 from its general treasury into the Canal Fund, as interest upon moneys which it had used belonging to that fund for the purpose of raising troops, yet such interest was not recoverable by the State from the United States.

3. The said court erred in holding that the State, simply because it was the custodian of two funds, one of which it owned itself and the other of which it only held as trustee under its Constitution and laws, could not recover interest which it allowed and paid to the trustee fund for moneys which it had

borrowed from said trustee fund to carry out the purposes mentioned in the act of July 27, 1861, although it might have recovered such interest if the moneys had been borrowed from a third party and such interest had been paid to a third party.

NINTH.

Judgment should have been recovered by the State for the additional sum of $39,867.13, being the interest upon the Canal Fund moneys borrowed and used by the State.

Assuming that interest upon moneys borrowed is ever recoverable from the United States, it is reasonably clear that this particular interest, for many equitable as well as legal reasons, should have been allowed.

The facts are clearly stated in the ninth "finding" of the court below. (Record, pages 8 and 9.)

The State, in 1861, had no moneys in its treasury applicable to the raising of troops, but did have in its custody a fund of $2,039,663.06, known as the Canal Fund, which, under the Constitution and laws of the State, could not be diverted from said fund or used for any other purpose except to be applied as a sinking fund for the benefit of the canal debt to meet it when due; but it could be loaned or invested, as was customary, for the benefit of said Canal Fund. Accordingly, the Commissioners of the Canal Fund, a board having the legal control of said fund, on May 21, 1861, authorized the Comptroller to use $2,000,000 thereof for military purposes at five per cent, and of this amount the sum of $1,623,501.19 was so used in the raising of troops; and in December, 1891, the United States repaid to the State, on account of moneys so expended, the sum of $1,113,000

(leaving unpaid $510,501.19 of the moneys so used from the Canal Fund), which sum was paid, or placed, to the Canal Fund, with interest, on April 4, 1862; and the amount of interest, at five per cent per annum on the moneys of the Canal Fund so used by the State, was $48,187.13; but the State, during the same time, had received interest on portions of the money while it was lying in the bank unused, to the amount of $8,319.95, leaving a net deficiency of the State on account of interest on such moneys in the sum of $39,867.13, which sum was paid into the Canal Fund from the State treasury April 4, 1862.

The foregoing are the facts. They have been found by the Court of Claims from conflicting, or rather from much confusing, evidence produced before that court. The facts in regard to the various funds of the State were somewhat complicated, their precise status being difficult to comprehend at once, and largely a question of elaborate bookkeeping, but they have been rendered clear by the very plain, simple and explicit findings of the court below, which will be accepted by this court as *the* facts of the case, from which the questions of law arise.

(a). The first question arises, was there a *loan* of the canal moneys?

We answer, yes, in fact; but if not in fact, then virtually, practically, essentially.

There is no particular form or ceremony required to constitute a loan. No set of words need be used.

"To loan" means, according to Worcester, "to offord, or supply, *on condition of a return*."

The Commissioners of the Canal Fund, who are conceded to have been authorized to invest these moneys, expressly authorized the Comptroller to

use them, stipulating, at the same time, for their return with five per cent interest.

The writing, the order, the arrangement of May 21, 1861, or by whatever name it might be called, was, for every practical purpose, a binding *contract*.

An authority to *use* certain moneys, on condition of their return with interest, is a loan — nothing more, nothing less. The law regards the *substance*, not the *shadow*, of a transaction, in considering its effect.

(b.) The mere fact that a board of State officers loaned the moneys to a single State officer (*ex officio*) does not change the nature of the transaction.

The General Fund and the Canal Fund were entirely distinct. The Canal Fund could be loaned to anybody, to any official, board or body whatsoever. There were no limitations to or restrictions upon the authority of the Commissioners, and they could lend to the State *via* the Comptroller, or *vice versa*, as well as to any one else or in any other way. The State was trustee of a trust fund; the fund was actually under the control of a board of certain State officers, who were authorized to loan the fund, and there was no legal difficulty in that board loaning the moneys to another State officer for a particular purpose, under an agreement to repay. There may be a question of propriety involved in the State loaning one fund to another fund, acting through different officials, but the transaction is not illegal.

But it is said that the State in reality owned both funds, and could not pay interest to itself, so as to claim reimbursement from the United States.

If the State could borrow from a stranger, why could it not borrow from a fund of which it was trustee; and if it paid interest to the trustee fund,

why does not the interest so paid constitute a part of the cost in obtaining the money?

Both in form and substance, there was a borrowing — a loan, because the State did not have any money in its General Fund, and it could not use the moneys of the Canal Fund except by "borrowing" it, or, what is the same thing, *using* it, under an agreement to return it with interest; and it having so used it, and having returned to the Canal Fund interest for its use, the interest so paid entered into the cost and expenses of raising troops as much as though the State had issued its own bonds, sold them, and then paid interest upon them.

(c). In one sense, the Canal Fund did not belong to the State. The State could not appropriate it, could not use it except by loaning it, could not give it away, could not spend it. It, in reality and equitably, belonged to the creditors who owned the canal debt, and the State merely acted as trustee, having its control through certain designated State officers. The control of the State over this fund was simply to invest it — to loan it, upon interest.

(d.) The State's right to recover this interest is sought to be defeated upon the untenable ground that in using this Canal Fund for the purpose of raising troops, the fund was misappropriated and the officials acted illegally. That might be so if the fund had been arbitrarily diverted or taken and used, without any understanding or agreement as to its return with interest; but with those conditions existing, the transaction became a contract and its validity unquestionable.

(e.) The interest paid by the State to the Canal Fund was not interest paid to itself. As before

stated, the State did not really own that fund, it could not destroy it, it was at most only a trusee of it.

The interest paid was raised from the taxpayers, and depleted the General Fund just to the extent of its amount, and hence was a burden, an expense, a *cost* to the State. That fund, in equity, belonged to the owners of the canal debt, and it was practically borrowed from them.

The indemnifying statute of 1861 was intended to *fully* reimburse the taxpayers of the State for whatever it cost them to raise the troops, and how can it be justly said that the amount paid from the general fund (a fund raised by tax) for interest to a special fund really belonging to the creditors of the State was not a legitimate portion of the disbursements? Whatever interest the Canal Fund earned, and whatever interest was paid, did not go into the general treasury of the State, but returned to the fund. The State never had the benefit of that interest again, and it has been finally lost to the State unless it shall be recovered from the United States in this claim.

(f.) If the State, instead of using the Canal Fund under an express agreement to return it with interest, had issued more bonds for the moneys it needed, and the Commissioners of the Canal Fund had gone into the market and purchased the bonds, which the State subsequently paid with interest, why would not the money so paid for interest constitute an *expense*, within the meaning of the act of 1861? The mere fact that the Commissioners held the bonds when they were paid does not make the transaction any different than if a stranger had held them.

Ostensibly — nominally, perhaps — the interest was paid by the State to a department of the State,

but that department represented not the State, but creditors — third persons.

The payment for interest was a cost and an expense in either case — a cost to the taxpayers of the State.

(g.) We can add little to the strong reasoning of Judge Nott in the court below, who agreed with Judge Weldon in favor of the allowance of the sum of $91,320.84 for interest paid on the bonds, but who disagreed with him in not allowing the $39,867.13 for interest paid upon the Canal Fund moneys. Judge Nott held that the State should have recovered the latter sum also, and his exhaustive and learned opinion upon this point affords complete justification for his conclusion. (See Judge Nott's opinion, Record, pages 22 to 26.)

(h.) While Judge Weldon's able opinion in favor of the allowance of the interest paid on the bonds appears unanswerable, yet, upon the other branch of the case, he seems to have inadvertently misapprehended some of the facts of the case, and thereby reached a wrong conclusion.

On page 16 of Record he says: "In connection with this item of claim, it may be said that no interest was paid by the State of New York; it simply failed to realize, for the benefit of the Canal Fund, certain interest which, by the investment of the money appropriated for the use of the defendants, it might otherwise have saved to that fund.

On page 19 he says: "There was no absolute payment of interest." On page 20 he says: "The State paid no money directly for the use of the money belonging to the Canal Fund." Again, on the same page, he says: "During the time the money was diverted from the Canal Fund to the purposes of the United States, the State simply lost the use of that

amount." We submit that these statements are erroneous.

In the first place, they contradict the findings of fact of the court (in which all the judges are assumed to have concurred), as appears in finding IX. (Page 8 of Record.)

That finding expressly states, in speaking of the moneys borrowed from the Canal Fund and returned by the United States: "And which sum was placed to the Canal Fund, *with interest*, on April 4, 1862." (Page 9 of Record.)

And again, at the end of the ninth finding, it is specifically found that "the net deficiency of the State on account of interest on such moneys during the period which they were so used was $39,867.13, which sum was paid into the Canal Fund from the State treasury April 4, 1862."

These findings must be regarded as conclusive of the question.

In the second place, there was an actual payment, and the *evidence* so showed. Of course, it was largely a question of bookkeeping, and the State, or the Comptroller, having *agreed* to pay interest when the funds were originally borrowed, or permitted to be used, the State, or Comptroller, was liable for it, and when the amount of the interest was credited on the books to the Canal Fund, that was a payment.

It matters little how it was, in fact, done. It is sufficient that in the settlement — the accounting — the scheme, or form, of bookkeeping adopted, the Canal Fund was fully indemnified, and eventually received five per cent for the moneys which the Comptroller, or the State, used, and that the State paid, allowed or credited that sum out of the State treasury, and will lose it unless received back through this claim.

(i.) Again, at page 21 of Record, Judge Weldon says: "It does not affirmatively appear that the fund upon which the claim of $39,867.13 is based could, for the period of time it was used by the State for the benefit of the defendants, have been loaned."

No such affirmative evidence was necessary. Our claim to recover interest is not based upon any such theory. Unless there was a loan — unless the transaction whereby the State was permitted by agreement to use the Canal Fund, and to pay interest therefor, can, for every practical purpose, be regarded as essentially a loan, then, of course, no interest is legally recoverable. Otherwise the action of the State officers was illegal, unauthorized, unconstitutional. No such harsh or strained construction should be tolerated.

The judgment of the Court of Claims should be modified by adding thereto the sum of $39,867.13, and then affirmed as modified.

T. E. HANCOCK,
Attorney-General of the State of New York,
For Said State.

DAVID B. HILL,
Of Counsel.

Office Supreme Court, U. S.
FILED.
APR 10 1895
JAMES H. McKENNEY,
CLERK.

CASES Nos. 14831 AND 15083.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT, v. THE STATE OF NEW YORK. } No. 285.

THE STATE OF NEW YORK, APPELLANT, v. THE UNITED STATES. } No. 422.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT, v. THE STATE OF NEW YORK. } No. 285.

THE STATE OF NEW YORK, APPELLANT, v. THE UNITED STATES. } No. 422.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

These are cross appeals from a judgment of the Court of Claims entered upon findings made in a case transmitted by the Secretary of the Treasury. The State of New York petitioned to be paid the sum of $131,188.02, with interest from July 1, 1862. The court gave judgment for $91,320.84 without interest. Both parties appealed.

The case is stated in the letter of the Secretary of the Treasury to be transmitted under § 1063 of the Revised

Statutes. A motion to dismiss the appeal of the State of New York on the ground that said section has been repealed or abrogated by subsequent legislation, and that the court therefore had no jurisdiction to enter any judgment in the premises, has been made, and the consideration thereof postponed until the final hearing. If this point was well taken, either both appeals must be dismissed or the judgment reversed and the Court of Claims directed to simply report its finding to the Treasury Department according to the provisions of § 12 of the Tucker Act of March 3, 1887, ch. 359.

STATEMENT OF FACTS.

The facts are so clearly stated in the findings of the Court of Claims at pages 5–11 of the record, that an extended statement is hardly necessary. In brief, the relevant facts are as follows: Between April 22, 1861, and July 4, 1861, the State of New York enlisted and equipped 38 regiments, numbering in all 30,000 men, to be mustered into the military service of the United States for the period of two years or during the war, to aid in the suppression of the war of the rebellion. These troops were enlisted and equipped under the provisions of the New York act of April 15, 1861, ch. 277; and under the same act the sum of $3,000,000 was expended by the State authorities for this purpose.

There being no money in the State treasury not specifically appropriated for other purposes, it became necessary to borrow these moneys. Part were borrowed from the public upon the security of bonds issued by the State for that purpose. The balance were borrowed from a special

fund held by certain State officers, and called the "canal sinking fund." Out of its general treasury the State subsequently paid interest not only to the holders of the said bonds, but also into its own canal sinking fund.

By the act of July 27, 1861, ch. 21, entitled "An act to indemnify the States for the expenses incurred by them in defense of the United States," Congress provided as follows:

> That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury.

By the joint resolution No. 16, of March 8, 1862, Congress declares that said act "shall be construed to apply to expenses incurred as well after as before the date of the approval thereof."

Under this act the principal moneys thus expended by the State were promptly repaid. The State's claim for interest moneys remained pending in the Treasury Department from 1862 until 1889, when it was transmitted to the Court of Claims as aforesaid.

This unadjusted claim naturally divides itself into two elements: First, the claim for interest moneys paid bondholders; second, the claim for interest moneys paid out of one fund in the State treasury into another.

The members of the Court of Claims were divided in opinion upon the case. Its judgment, as above stated, was in favor of the State upon the first question, and in favor of the United States upon the second. Only two judges, however, concurred in the entire judgment. Chief Justice Richardson dissented from the judgment against the United States, while Judge Nott dissented from so much of the decision as denied the claim of the State of New York to recover for moneys paid to itself. Judge Scofield did not participate in the decision.

As to the interest paid bondholders. A special tax was laid by the act of April 15, 1861, to meet the expenses thereby authorized; but the moneys thereby raised were not available until 1862. The State accordingly raised $1,250,000 upon bonds running one year and bearing interest payable quarterly at the rate of 7 per cent *per annum*, which at that time was the legal rate of interest under the laws of the State. The interest on these bonds amounted to $91,323.04.

As to the interest paid the canal sinking fund. The then constitution of the State of New York provided for a fund, to be constituted by annual appropriations out of the revenues of the State canals (which appropriation, at the time mentioned, amounted to $1,700,000 annually), "as a sinking fund to pay the interest and relieve the principal of that part of the State debt called the canal debt;" and provided that "the principal and income of the State sinking fund shall be sacredly applied for that purpose." (Constitution of 1846, Art. VII, § 1.) The lieutenant-governor, secre-

tary of state, comptroller, treasurer, and attorney-general were made the "commissioners of the canal fund," their powers and duties to be prescribed by law. (Art. V, §§ 5, 6.) The laws then existing provided that the surplus revenues of the canal fund should be applied to the purchase of canal stock of the State; or, if such purchase could not advantageously be made at any time, then that they should be invested in the public stocks of the United States, or of the cities of New York or Albany, or "any stocks for the payment of which the faith of this State is or shall be pledged;" and the commissioners were authorized to deposit the moneys belonging to this fund with any safe incorporated moneyed institutions or banking associations in the State. (1 N. Y. Rev. Stat., 5th ed., p. 522.)

Four out of the five commissioners of the canal fund on May 21, 1861, adopted a resolution authorizing the Comptroller to use not over $2,000,000 of that fund by investing it "in the tax levied for military purposes * * * at 5 %." (Rec., pp. 8–9.) It will be noticed that this resolution was of doubtful legality. A so-called investment in a tax was not provided for by the constitution or laws of the State, and, indeed, was by a practical construction supposed to be proper only when specifically authorized by statute. (See N. Y. act of March 30, 1861, ch. 102.) The commissioners, however, assumed the responsibility of making this investment in view of the peculiar exigencies of the situation.

The interest on the canal fund moneys so used, less interest on deposits of the moneys lying in bank unused,

was $39,867.18, which sum was paid into the canal fund from the State treasury on April 4, 1862. (Rec., p. 9.) This payment was doubtless made out of what is called in that State the "general fund," out of which most of the expenses of the State are paid. (See Constitution of 1846, Art. VII, § 2; *People* v. *Home Insurance Co.*, 92 N. Y., 328, 335, and cas. cit.) The "general fund" and the "canal fund," as well as other funds mentioned in Article IX of the constitution, were all regarded as in the treasury of the State (Art. VII, § 8), so that paying money from one into another was substantially but a transfer in bookkeeping.

ASSIGNMENT OF ERROR.

The error assigned is the judgment of $91,320.84 against the United States.

ARGUMENT.

I.

Whether the Court of Claims had jurisdiction to enter any judgment, quaere.

This subject was fully discussed in the brief heretofore filed upon the motion to dismiss the appeal of the State of New York. If § 1063 of the Revised Statutes has been repealed or abrogated, and the Tucker Act now affords the only procedure in departmental cases, then either the appeal should be dismissed on the ground that the judgment is a nullity or the judgment should be reversed and the Court of Claims directed simply to transmit its findings to the Treasury Department.

II.

Prior to 1861 *it had been long and well settled, by an almost uniform departmental practice, that interest was not payable by the United States except when provided for by statute, either expressly or by reference to other statutes or judicial decisions.*

The first reported Attorney-General's opinion (1 Op., 17) deals with the question of interest on indebtedness of the United States, and decides against the claimant. It lays down no general rule, however.

Attorney-General Wirt in 1819 (1 Op., 268) refers to a "usual practice of the Treasury Department," not to allow interest in favor of individuals as against the United States. As between independent nations, his views concerning interest do not seem entirely clear. (1 Op., 554, 555; 2 Op., 28, 33, 156.) His opinion at 1 Op., 722, is on an act entitled "an act authorizing the payment of interest due to the State of Virginia."

Attorney-General Berrien in 1830 (2 Op., 390) says that claims against the Government, "however undoubted, are not payable until demanded, and then without interest, unless the claimant shall have paid interest; in which case, indeed, interest becomes strictly a portion of the principal of his claim." This proviso was *obiter*, and, as will be pointed out, inconsistent with the practice of the Treasury Department. Mr. Berrien denied interest to the claimant before him.

Attorney-General Taney in 1831 (2 Op., 463) advised the Secretary of War that he had the power to allow

interest on a claim. This decision is contrary to the current of authority, and seems to have been soon forgotten. (See 3 Op., 635, 639.)

Attorney-General Butler in 1837 (3 Op., 294) allowed interest under the act of July 2, 1836, (ch. 341, 6 Stat., 679), but that statute directed the accounting officers to recognize a certain judicial decision as settling the relative rights of the parties. Interest was allowed by the decision, and upon this, mainly, the opinion rested, as explained in 4 Op., 14, 15. In 1838, however (3 Op., 320), he allowed interest and costs on a protested draft drawn by the Treasurer of the United States. This opinion and that of Mr. Nelson to the same effect (4 Op., 299) are based on the principle of *United States* v. *Bank of Metropolis* (15 Pet., 377), that by becoming a party to negotiable paper the Government is responsible like an individual. Yet even this exception has perhaps been wiped out. (*United States* v. *North Carolina*, 136 U. S., 211, 218.)

Attorney-General Crittenden, in 1841 (3 Op., 635, 639), says: "It is confidently believed that in all the numerous acts of Congress for the liquidation and settlement of claims against the Government there is no instance in which interest has ever been allowed, except only where those acts have expressly directed or authorized its allowance." Hence, construing an act for repayment of "losses occasioned by the troops," he held that it did not authorize the allowance of interest.

Attorney-General Legare, in 1842, in Cogswell's Case (4 Op., 14), calls the rule against allowance of interest "one of the best ascertained and most inflexible," the

exceptions to which would be "rare and singular." The act discussed by him at 4 Op., 79, expressly allowed interest. Being asked to reconsider Cogswell's Case, he said (4 Op., 136, 138): "I am bound to adhere to the course of the Executive Department until Congress shall see fit to change it;" speaking of the rule as settled "by the uniform practice of the Treasury."

Attorney-General Nelson in 1843 (4 Op., 286, 292–4), referred to Mr. Crittenden's opinion as sustaining "what I understand to have been the uniform practice of the Department in regard to claims under these laws. * * * Independently of the reasoning enforced by it, it is fortified by the concurring and uniformly maintained decisions in analogous cases of all the officers of the executive branch of the Government. * * * Now, it strikes me as clear that the omission in the act of 1834 to direct the payment of interest should, under the circumstances, be regarded as a recognition of the settled practice of the Department to disallow it."

Attorney-General Toucey in 1849 (5 Op., 71) in the case of Fisher's heirs, without discussion allowed interest under a statute providing for a fair and full indemnity. (Act of April 12, 1848, ch. 30; 9 Stat., 712.) The question asked of him seems to have assumed that interest was payable; and he was asked only as to period and rate. The allowance in this case is anomalous and is disapproved in *Gordon* v. *United States* (7 Wall., 188).

Attorney-General Johnson in the same year (5 Op., 105, 108) discusses an act of 1814, under which interest had been allowed by the accounting officers whose allow-

ances had been confirmed by subsequent appropriation acts. While recognizing the general rule that the Government pays no interest, he says that there are exceptions, and that whether this is one is not an open question, while approving of the policy of the rulings under this act. The act would not receive such a construction under the later decisions of this court. The same Attorney-General's decision in *Galphin's Case* (5 Op., 227) was based on the fact that the United States had come into possession of land charged with an interest-bearing debt.

Attorney-General Crittenden, in 1851 (5 Op., 333, 350–3), in reference to the Florida treaty claims, discusses the question of interest and holds that the rule against allowing it is too firmly fixed in Department practice to be reconsidered. His opinion upon the claim of the State of Florida is hereinafter described.

Attorney-General Cushing, in 1854 (6 Op., 533, 539–43) and 1855 (7 Op., 5), reviews prior opinions and Treasury rulings at length and reaches the same result.

Attorney-General Black in 1857 (9 Op., 57), in examining an act paying interest to the State of Maryland, used language which has since been often quoted:

> First of all it must be kept in mind that, as a general rule, the Government does not pay interest. The exceptions to this rule are found only in cases where the demands are made under special contracts or special laws, expressly providing for the payment of interest. * * * He who claims a payment out of the Treasury, and bases that claim upon an act of Congress, must show the payment to be authorized either expressly or by very clear implication. Ambiguous phrases will not serve his turn. * * * Of

> course, I do not now mean to say that a claim ought to be defeated by straining the sense of the law against it. But if Congress has all the money of the United States under its control, it also has the whole English language to give it away with; and it is so easy to use definite terms in a law like this that when they are not used we will presume them not to be meant.

And at page 62 he adds—

> I do not think that the respect we owe to a State makes any difference in the right.

The latest opinion at the time of the passage of the act now under consideration was that of Attorney-General Black, dated July 20, 1860 (9 Op., 449), construing the joint resolution of June 15 of that year in favor of W. H. De Groot, laying down again in strong terms the rule that "interest is never given by construction."

The first eight volumes of Attorney-Generals' Opinions were published in 1858. Mr. Black had been out of office but a few months in July, 1861. His rulings, and the general rules laid down after consideration of the precedents by Messrs. Crittenden and Cushing, must be presumed to have been known to Congress at the date last named.

Other precedents of which Congress must be presumed to have been aware were the Treasury rulings upon the very similar claims of the States for expenses incurred during the war of 1812. These are referred to in the opinion of Attorney-General Brewster on the present claim. (17 Op., 595.) The original acts were couched in broad terms, but held by the accounting officers not to carry interest—even interest actually paid out by the States.

Special acts granting interest were then passed by Congress, and, as he shows, the subsequent claims for expenses during Indian and Mexican wars had a similar history. The acts of 1842, quoted by Mr. Brewster, were certainly as broad as that now under consideration.

The State of New York relies largely on an opinion of Mr. E. J. Phelps, as Second Comptroller of the Treasury in 1851, holding interest allowable to the State of Florida, but only when it represented moneys actually paid out by that State. He quotes remarks of Messrs. Wirt and Berrien, which were *obiter* in character. The statute under consideration by him contains language which plainly carries interest, by reference to former statutes by which it had been expressly allowed:

> For reimbursing the State of Florida, under such rules and regulations as have heretofore governed the adjustment of similar claims of the United States, for moneys advanced, etc. (Act of February 27, 1851, ch. 12, 9 Stat., 573.)

The statutes thus referred to are catalogued in the aforesaid opinion of Attorney-General Brewster, which is printed as an appendix hereto.

If the statute construed by Mr. Phelps differed in no way from those construed by the Treasury decisions referred to by Mr. Brewster, then his decision is merely a single exception to a course of construction otherwise substantially uniform. If we are right in believing the statute entirely distinguishable and the case correctly decided on its merits, then the decision is immaterial for the purposes of the present point.

Mr. Phelps's argument is a very strong presentation of the claim for interest. That his distinction between interest paid and interest saved is not, however, well taken we shall hereinafter endeavor to show.

In this respect, indeed, it was overruled by Attorney-General Crittenden in an opinion dated only sixteen days later (5 Op., 455, 461–464), and holding that Florida should be indemnified "where it shall appear that said State has paid or lost interest, or is liable to pay interest, on that account." Mr. Crittenden bases himself largely on the peculiar language of the act of 1851, which, as he held, referred to certain acts set forth by him: the act of March 22, 1832 (ch. 51), directing interest to be paid to South Carolina upon moneys "drawn by the State from a fund upon which she was then receiving interest;" the act of June 2, 1848 (ch. 60), directing the payment of interest on Mexican war claims "where the State, corporation, or individual has paid or lost interest, or is liable to pay it;" and the act of January 26, 1849 (ch. 25), directing the payment of interest to Alabama, but not "on any sum on which the State of Alabama did not either pay or lose interest."

The then recent act of March 3, 1851 (ch. 35), allowing payment of interest to Georgia, was in similar language to the Alabama act, ending with the words "pay or lose interest."

An opinion of Second Comptroller J. M. Curtis with reference to a claim of the State of Maine is also relied on. As to this, we need simply refer to the act construed (act of February 9, 1859, ch. 27), which refers to the act of 1848 for details.

III.

It is therefore presumable that Congress did not intend to give interest by the act of 1861.

Under the settled departmental construction, interest must be given expressly or by reference, and can not be given by mere construction. The old opinion of Mr. Taney to the contrary had long been overruled. The exception suggested by Mr. Berrien rested as a mere *obiter dictum*, opposed to the nearly uniform practice of the Treasury and more than neutralized by the *obiter dicta* of his successors.

No variation in language in 1861 can be held to carry interest by implication. As Mr. Black had said of the public money, Congress had "the whole English language to give it away with." If Congress had had the subject of interest in mind, and intended to give it, the intent would have been expressed either in direct terms or in the language of the Georgia or Florida act of 1851.

> If the departmental practice and interpretation * * * had been of long standing and uniform prior to [1861] it was to be presumed that, if such interpretation had been false and vicious, Congress would have guarded against a like interpretation of the act of [1861]. (*Earnshaw* v. *Cadwalader*, 145 U. S., 247, 258.)

When acts are "nearly alike in their provisions" the construction of the earlier ones must be applied to a later one "which contains no substantial change in phraseology." (*Hedden* v. *Robertson*, 151 U. S., 520, 526).

We may safely go further, and claim that the practice of denying interest need not have been uniform. A practice merely general, though not uniform, would be enough to make Congress explicit if it had the subject of interest in mind.

IV.

Subsequent authorities confirm the rule that interest must be provided for either expressly or by reference.

By an act of 1863, now § 1091 of the Revised Statutes, Congress made this a general statutory rule applying to the Court of Claims.

In *Gordon* v. *United States* (7 Wall., 188, 193–4) the case of Fisher's heirs, above referred to, came before the Supreme Court, which decided the case on other grounds, but intimated its disapproval of the interest allowed claimants by the Secretary of War.

In *United States* v. *McKee* (91 U. S., 442, 451), this court allowed interest, Justices Clifford and Hunt dissenting, and Justice Davis not taking part in the decision. The reasoning by which the interest was granted is somewhat similar to that of Attorney-General Butler in the opinion above cited. The statute under consideration provided that, "in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases." The Court of Claims found as a fact that "no rules and regulations have heretofore been adopted by the United States in the settlement of like cases, except such as may be inferred from the policy of Congress when passing private acts for the relief of vari-

ous persons. When passing such private acts, Congress has allowed interest upon the claim up to the time that the relief was granted." Mr. Justice Miller said:

> That the allowance of the principal sum was right we think is beyond question; but the allowance of interest admits of discussion.
>
> It has been the general rule of the officers of Government, in adjusting and allowing unliquidated and disputed claims against the United States, to refuse to give interest. That this rule is sometimes at variance with that which governs the acts of private citizens in a court of justice would not authorize us to depart from it in this case. The rule, however, is not uniform; and especially is it not so in regard to claims allowed by special acts of Congress, or referred by such acts to some Department or officer for settlement.
>
> The counsel for claimant has, in a careful brief, collected with much labor numerous cases in which interest has been allowed by Congress in the adjustment of disputed claims. The fifth section of the act of August 5, 1790, already referred to, directed the commissioners, who under that act were to settle the claims of the States against the General Government, to allow interest; and but for the bar of time in that act this case would have come under that statute. The act under which the Court of Claims took jurisdiction of this case directed it to be "governed by the rules and regulations heretofore adopted by the United States in settlement of like cases." This is a like case to those in which interest was to be allowed by the act of 1790.
>
> The bill of exchange drawn by Clarke in favor of Vigo is an instrument which, by the commercial usage of all nations, bears interest after it becomes due. It also evidences the claim as a liquidated sum. There has never been any dispute about the amount due,

> if the claim was legal, and though the United States is not directly bound by the instrument, yet, if they choose to remove the bar of time, as the act of 1872 does in express terms, and it is found that the claim is one which the Government has by law agreed to pay, we see no reason why it should not be paid in full, with all its legal incidents, as the State of Virginia should and would have paid it had not the liability been assumed by the United States when she received the cession of that immense country—a consideration ample enough for this and all other obligations she assumed in that contract.

Tillson v. *United States* (100 U. S., 43), construed a statute referring claim to the Court of Claims, to "ascertain, determine, and adjudge the amount equitably due such firm, if any, for such loss or damage." This court unanimously held that interest was not allowable.

Harvey v. *United States* (113 U. S., 243) construed the statute of August 14, 1876, ch. 279, referring claim to the Court of Claims, "to proceed in the adjustment of the accounts between said claimants and the United States as a court of equity jurisdiction," and directing it, "according to the rules and principles of equity jurisprudence in its judicial discretion," to "render such judgment as justice and right between the claimants and the said Government may require." This language was held not to carry interest.

In *United States ex rel. Angarica* v. *Bayard* (127 U. S., 251, 260) Mr. Justice Blatchford laid down the rule that interest is only paid where "given expressly by an act of Congress either by the name of interest or by that of damages."

The latest case is *United States* v. *North Carolina* (136 U. S., 211.) That was an original suit by the United States against the State of North Carolina upon certain bonds which on their face carried interest until payment of the principal. The statute under which they were issued, however, made no mention of any interest after the due day. It was held that no interest was allowable. The authorities are reviewed by Mr. Justice Gray, who distinguishes the McKee Case on account of the special clause above cited.

Attorney-General Brewster's opinion in this matter (17 Op., 595) is printed as an appendix hereto.

V.

The act of 1861 *can not be construed as covering interest paid by one fund in the State treasury to another.*

In whatever fund the money is deposited, it belongs to the State. The interest is paid by the State to itself. This substantially, therefore, is a claim for interest lost, not a claim for interest paid. Every claim for interest by way of damages is in effect a claim for interest lost.

The distinction between such cases and payments to individual creditors had been recognized long before (Opinion of Attorney-General Crittenden upon claim of State of Florida, *supra,* and acts cited).

It is suggested that, as to the "canal fund," the State is holding not in its own right, but as trustee for the creditors interested in the canal debt. The fund, however, was a mere sinking fund established by the State in its own interest, and involving no element of contract or

trust. The debt was mainly incurred long before, when the Erie Canal was built. The fund was started in 1846, in lieu of an entirely different fund provided by the constitution of 1821 (Article Seventh, sec. X).

We do not desire to add anything further on this point to the opinion of Judge Weldon, at pages 19–21 of the record.

VI.

Nor can the act of 1861 *be construed as covering interest paid to bondholders.*

There are no words in the statute indicating that interest was in the mind of Congress. If it had been in the mind of Congress it would have been specifically included. It may be suggested that such a construction is not generous to the States. If not, then the responsibility for the lack of generosity is on Congress. It is, moreover, to be said in reply to this suggestion that the construction of the Court of Claims by which interest paid is repaid, while interest lost is not made up for, is an unfair discrimination between the different States.

As said by Chief Justice Richardson in his dissenting opinion (p. 21):

> Interest on temporary loans made to obtain money for equipping, etc., troops for the United States is no more a charge against the Government under the act of 1861 (12 Stat. L., 276) than is interest on long-time bonds issued by many States for the same purpose, computed to time of payment by the Government, for which it is conceded the United States are not liable.

> In either case interest paid constitutes no part of the "costs, charges, and expenses properly incurred by said State for enrolling, subsisting, clothing, supplying, arming, equipping, and transporting its troops," within the meaning of the act. It is paid for another purpose, to wit, for the use of money raised to supply an empty treasury, an indirect expenditure, dependent upon collateral contingencies, upon the different conditions of the treasuries, and the different and uncertain legislation of the several States for raising money by taxation, obviously not within the contemplation of Congress, and never allowed by the Treasury Department to any State under this act.
>
> An unequal application of the statute in the different States could not have been intended by Congress.

Such a construction would make the amount paid to each State depend upon the chance condition of its treasury in 1861. One State might have money in the treasury immediately available, which could be applied at once to war expenditures, and the same State might immediately thereafter have to borrow money for its own running expenses—money which would not have been borrowed had it not been for the military necessities. Another State with precisely the same credit and precisely the same revenue might, on account of the condition of its treasury at the moment, have to borrow for the military expenses while its own running expenses were all provided for. These two States ought to receive the same treatment from the United States; yet under the decision of the Court of Claims one would get its interest back, while the other would fail.

Moreover, different States have different degrees of credit. Some borrowed on short time, while others borrowed on

long time. It may be permissible to take, for illustration only, the actual cases of the States of Illinois and Wisconsin, which also presented claims for interest. Illinois borrowed at 6 per cent upon bonds due after 1879. (State Treasurer's Report, annexed to Ill. Public Laws of 1863, pp. 26, 34, 49.) Wisconsin, on April 13, 1861, empowered the Government to borrow not over $100,000 at par on bonds carrying 6 per cent interest payable in ten years and redeemable in five years. (General Laws of Wisconsin for 1861, pp. 266, 267.) On May 27, 1861, the governor, state treasurer, and secretary of state, or a majority of them, were authorized to borrow not over $1,000,000 at interest not over 6 per cent, redeemable at various dates begining July 1, 1877. (*Id.*, pp. 339, 341.) New York, as has been seen, borrowed at 7 per cent on short time.

It may be remarked that the United States, under the acts of July 17 and August 5, 1861, borrowed at par immensely greater sums of money at the rate of 6 per cent for bonds payable at the pleasure of the United States after twenty years, and 7.30 per cent upon Treasury notes running three years, the notes being exchangeable for the bonds. Six months later, under the act of February 25, 1862, $1,000,000 were borrowed at par upon 6 per cent bonds not payable for twenty years, although redeemable after five years. (See Statement of outstanding indebtedness of the United States, annexed to Secretary Boutwell's Annual Report of 1869.) It can not be said, therefore, that the United States, when the act of July 27, 1861, was passed, was in any need of assistance in the way of credit.

It is suggested that New York presents only short-term bonds. The statute, however, must apply to short-term and long-term bonds alike.

The case must stand upon the wording of the act, construed in the light of prior and subsequent authorities. If interest ought to be paid, the State should apply to Congress; and Congress, if it pays any interest to one, should pay in the same proportion to all in order to be fair to each.

VII.

The construction here given is confirmed by the failure of Congress to legislate further in the premises.

Its inaction in regard to these claims is in strong contrast with its action after similar decisions of the accounting officers in relation to claims of the various States for expenses of previous wars. It is proper for the court to consider this element of the case. (See *United States ex rel. Angarica* v. *Bayard*, 127 U. S., 251, 260.)

VIII.

Governor Morgan's office of Major-General and his correspondence with Secretaries Seward, Cameron, and Stanton are immaterial.

This claim is not for supplies on requisition of Governor Morgan as major-general of volunteers in the military service of the United States; nor did the persons who furnished the supplies look to the United States for payment. Neither Major-General Morgan nor any of the Cabinet officers mentioned had any authority to assume the payment of interest on bonds of the State of New York,

unless it can be spelled out of the act of July 27, 1861. Acts beyond their authority would not bind the United States. (*The Floyd Acceptances*, 7 Wall., 666; *United States* v. *North Carolina*, *supra*.) The bonds were issued before the act was passed, and the act was passed long before Governor Morgan received his military appointment. In fact, the New York law of April 15, 1861, was not even passed at the request of the President. There was no element of contract and no looking for pay. The President's proclamation was issued that same day (12 Stat., 1258), and called for assistance from the militia of the several States, 75,000 in all, the details to be communicated through the War Department. New York had a militia already equipped. This law provided for 30,000 men, to be "in addition to the present military organization of the State and a part of the militia thereof;" and the money borrowed was "to defray the expenditures authorized by this act, or any other expenses of mustering the militia of this State, or any part thereof, into the service of the United States." It is a credit to the patriotism of the State of New York that she has no tenable claim of a contractual nature.

The question, therefore, necessarily comes down to the construction of the act of Congress.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

APPENDIX.

DEPARTMENT OF JUSTICE, *July* 23, 1883.

SIR: Your letter of the 7th of June, 1882, and the paper which accompanied it, present for my consideration the following question: Whether the claim of the State of New York for *interest* paid by that State on money borrowed and expended in enrolling, subsisting, clothing, etc., its troops employed to aid in the suppression of the rebellion is within the provisions of the act of July 27, 1861, entitled "An act to indemnify the States for expenses incurred by them in defense of the United States." Delay in answering this question has been occasioned mainly by the demands, from time to time, of other business that seemed to require immediate attention. I have now the honor to submit my views thereon.

The act of July 27, 1861, provides: "That the Secretary of the Treasury be, and he is hereby, directed, out of any money in the Treasury not otherwise appropriated, to pay to the governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury." By a resolution passed March 8, 1862, the above provision is to be construed to apply to expenses incurred as well after as before the date of the approval thereof.

Under this legislation the State of New York has already been reimbursed the amount of money which was expended by it for the objects specified in the act of 1861, exclusive of interest paid on the money so expended, all of which the State was compelled to borrow. Such interest formed an item in the account rendered by the State, but was not allowed in the adjustment thereof made at the Treasury, the accounting officers not regarding it as admissible under the statute. On the part of the State, however, it is urged that the interest mentioned properly constitutes a part of the "costs, charges, and expenses" incurred for the objects above referred to, within the meaning of said act.

According to the construction originally adopted and thus far uniformly acted upon in settling the claims of States under the act of July 27, 1861, the provisions thereof extend only to such outlays by the State as were made *directly and specifically* on account of "enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops;" and as payments made by the State on account of interest upon a loan to it of the money thus expended, though the expenses incurred for those objects were indirectly, and in a general way, augmented thereby, are not strictly outlays of the above character, such payments do not come within the scope of the act.

This interpretation accords with that which prevailed in the execution of similar provisions under which States were reimbursed for advances made by them during the war of 1812 and other subsequent wars.

By the act of April 29, 1816, chapter 160, an appropriation was made "for defraying the expenses incurred by calling out the militia during the late war," in addition to the sums theretofore appropriated to that object, which was applied to the reimbursement of States for advances to meet such expenses. By the act of March 3, 1817, chapter 86, an appropriation was made "for the pay-

ment of balances due to certain States on account of disbursements for militia employed in the service of the United States during the late war." And by the act of April 20, 1818, chapter 109, an appropriation was made "for the payment of balances due several States, on an adjustment of their accounts, for expenses incurred by calling out the militia during the late war." Although in each of these provisions very general and comprehensive terms are employed, yet they were not construed to authorize the reimbursement of expenditures made by the States on account of interest, and no claims for such expenditures were allowed thereunder. Congress subsequently provided for these claims by special legislation (thus impliedly recognizing the construction given the general provisions as above), and prescribed certain rules for their adjustment (see act of March 3, 1825, chapter 106; May 13, 1826, chapter 39; May 20, 1826, chapter 77; May 22, 1826, chapter 151; March 3, 1827, chapter 79; March 22, 1832, chapter 51).

So by the act of August 11, 1842, chapter 127, an amount was appropriated "to the payment and indemnity of the State of Georgia for any money actually paid by said State on account of necessary and proper expenses incurred by said State in calling out her militia" during the Seminole, Cherokee, and Creek campaigns in the years 1835 to 1838; and by the act of August 16, 1842, chapter 178, the Secretary of War was directed to audit and adjust the claims of the State of Alabama "for moneys advanced and paid by said State for subsistence, supplies, and services of local troops called into service by and under the authorities of said State," etc., during the Creek and Seminole hostilities. Under neither of these acts were allowances made for advances on account of interest. But by the act of January 26, 1849, chapter 25, in the case of Alabama, and by the act of March 3, 1851, chapter 35, in the case of Georgia, Congress

made special provision for such allowances under rules and according to rates there prescribed.

By a resolution of Congress passed March 3, 1847, a provision was made for refunding to the several States, etc., the amount of expenses incurred by them in organizing, subsisting, and transporting volunteers previous to their being mustered and received into the service of the United States for the Mexican war. This provision, it would seem, was not regarded as authorizing reimbursement for interest paid upon moneys expended for those purposes, since it was apparently deemed necessary, in order to authorize such reimbursement, to provide therefor by further legislation, which is found in the amendatory act of June 2, 1848, chapter 60.

Undoubtedly the interest paid by the State of New York on money borrowed and applied to the object specified in the act of July 27, 1861, forms a part of the burden borne by that State for the general public defense, and constitutes a just charge against the United States; and the obligation to reimburse for payments of that kind, made under similar circumstances, has frequently been recognized by Congress, as appears by statutes above cited. But to construe the provisions of that act so as to include such expenditures would be giving them a meaning much broader than that which has, in practice, been given other legislation of like character and purpose or than seems to be warranted by any sound rule of interpretation. Where a payment from the Treasury is claimed under a statute, the payment, in order to be allowed, should appear to be authorized either expressly or by very clear implication. (9 Opin., 59.) The language of the act under consideration, viewed with reference to claims based upon expenditure for interest, does not satisfy that requirement; for while no authority to reimburse the States for interest paid by them is expressly conferred thereby, such authority is not clearly

to be implied therefrom. Indeed, the absence of any provision in the act expressly authorizing reimbursement for interest rather gives rise to the implication that such reimbursement was not meant to be allowed thereunder, as in other similar cases reimbursement for interest has generally been made the subject of express authorization where Congress intended its allowance.

I am accordingly of the opinion that the claim of the State of New York, referred to in the question submitted, does not come within the provisions of the act of July 27, 1861.

Very respectfully, your obedient servant,

BENJAMIN HARRIS BREWSTER.

Hon. CHARLES J. FOLGER,
Secretary of the Treasury.

○

Office Supreme Court, U. S.
FILED.
OCT 18 1895
JAMES H. McKENNEY,
CLERK

CASES Nos. 14831 AND 15083.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANT, v. THE STATE OF NEW YORK. } No. 45.

THE STATE OF NEW YORK, APPELLANT, v. THE UNITED STATES. } No. 136.

APPEALS FROM THE COURT OF CLAIMS.

SUPPLEMENTARY BRIEF UPON THE JURISDICTIONAL QUESTION.

In the Supreme Court of the United States.

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APPEALS FROM THE COURT OF CLAIMS.

SUPPLEMENTARY BRIEF UPON THE JURISDICTIONAL QUESTION.

The position of the United States upon the jurisdictional question, heretofore raised by the motion to dismiss the appeal of the State of New York, is not the ordinary position of a litigant when moving to dismiss his adversary's proceedings. It is believed to be for the interest of the United States that the power to transmit claims under § 1063 of the Revised Statutes should be held still

existent. It is also for the interest of the United States, however, that all doubts as to the jurisdiction of the Court of Claims should be solved as speedily as possible.

In hopes of obtaining a speedy settlement of this question, a motion to dismiss the appeal of the State of New York was made early last spring. Having been postponed for oral argument, argued, and then again postponed for a reargument, it now comes up again for consideration. If the appeal of the State of New York be dismissed, it is clear that the appeal of the United States should be entertained only for the purpose of reversing the judgment of the Court of Claims as unauthorized, and directing that court simply to report its findings to the Secretary of the Treasury in accordance with § 12 of the Tucker Act, these findings being advisory only. Possibly the question might be sent back by the Secretary for adjudication upon a Comptroller's certificate. If not, then the result would be substantially equivalent to referring the State of New York back to Congress for relief, since, while debarring the Secretary of the Treasury from any assistance by this court, it would leave the authorities in conflict; the opinion of Attorney General Brewster and that of the chief justice of the Court of Claims being in opposition to the three other justices of that court who sat in the case.

The undersigned respectfully beg leave to submit the following additional remarks upon the questions raised by the motion.

II.

As to the theory that the Tucker Act is a complete jurisdictional act, and therefore supersedes all prior jurisdictional provisions.

This would seem, from its opening clause and from §§ 12 and 14, to have been the intention of the original framers of the Tucker Act, and the statute has been occasionally referred to as outlining the whole jurisdiction of the court. All parties on the prior argument seem to have overlooked § 4 of that act, which, so far as relevant to the present question, is as follows:

> That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force in so far as the same is applicable and not inconsistent with the provisions of this act.

One of the main objects of the Tucker Act was to give the circuit and district courts jurisdiction over certain claims against the United States. It may be that § 4 was intended to apply only to these courts. (Compare Rev. St., § 714.) It is broad enough, however, to include the Court of Claims as well, and seems to be intended to preserve all the jurisdiction granted by the Revised Statutes so far as that jurisdiction may not have been already repealed by the Bowman Act.

The Comptroller of the Treasury calls attention to the fact that if the Tucker Act is treated as completely superseding prior jurisdictional provisions, it will repeal the third paragraph of § 1059 of the Revised Statutes as well as § 1063.

II.

As to the theory that § 1063 of the Revised Statutes was abrogated or superseded by § 2 of the Bowman Act or by § 12 of the Tucker Act.

We take up these sections separately for consideration.

(A) *Rev. St., § 1063.*—This section relates to claims "involving disputed facts or controverted questions of law (1) where the amount in controversy exceeds $3,000, (2) or where the decision will affect a class of cases (3) or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, (4) or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States."

A peculiarity in this section calls for particular attention. It first deals with claims "made against any Executive Department." It then, as an entirely separate matter, provides that "the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim * * * to be transmitted * * * to the said court for trial and adjudication.

§ 1064 treats the preceding section as covering two different classes of transmissions:

> All cases transmitted by the head of any Department, *or* upon the certificate of any Auditor or Comptroller, according to the provisions of the preceding section, shall be proceeded in, etc.

Why are cases transmitted upon the certificate of an Auditor or Comptroller separately provided for? Why are they not included under the general head of claims against any Executive Department? Why are they not regarded as transmitted by the head of a Department, since the actual direction to transmit is made by the Secretary of the Treasury?

Both of these sections are taken from the act of June 25, 1868, ch. 71, § 7 (15 Stat., 76). Its provisions in this regard appear to have been drawn with deliberation. They emanated from the Judiciary Committee of the Senate, and their sponsor was Senator Edmunds (Cong. Globe, June 2, 1868, p. 2768) in the Senate, and Mr. Boutwell (id., June 18, 1868, p. 3267) in the House.

By the then very recent act of March 30, 1868, ch. 36, § 1 (15 Stat., 54), it had been provided that the act of March 3, 1817, entitled "An act to provide for the prompt settlement of public accounts"—

> Shall not be construed to authorize the heads of Departments to change or modify the balances that may be certified to them by the Commissioner of Customs or the Comptroller of the Treasury, but that such balances, when stated by the Auditor and properly certified by the Comptroller, as provided by that act, shall be taken and considered as final and conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts: *Provided*, That the head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may submit to such Comptroller any facts in his judgment affecting the correctness of such bal-

> ance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided.

This statute was reenacted into Rev. St., §191, as follows:

> The balances which may from time to time be stated by the Auditor, and certified to the heads of Departments by the Commissioner of Customs or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided.

This statute, which was substantially continued at the time of the recent reorganization of the accounting offices under the so-called Dockery Act of July 31, 1894, ch. 174 (28 Stat., 205–211), practically elevated the accounting offices of the Treasury, in their own province, into a distinct department of the Government. It made the decisions of the Comptroller, in these matters, binding upon all the Cabinet officers. It was believed to be declaratory in this regard (see remarks of Senator Williams of Oregon, Cong. Globe, Feb. 25, 1868, p. 1404; and of Mr. Justice Gray, quoted in *United States* v. *Harmon*, 147 U. S., at pp. 273–275). Nevertheless, the Auditor and

Comptroller are treated by the Revised Statutes, and still regarded, as subordinates of the Secretary of the Treasury. Their position as subordinates, and yet as not subject to his supervision in their most important functions, is analogous to the position of the Commissioner of Patents, discussed by this court in *Butterworth* v. *Hoe* (112 U. S., 50.)

It would appear, therefore, that the legislators of 1868 regarded the accounting offices as a separate establishment not strictly included in any Executive Department, and therefore requiring separate provision. Such anomalies in our governmental system have not been uncommon. For instance, it remained for generations in doubt whether the Sixth Auditor belonged to the Treasury or to the Post-Office Department. (20 Op., 677.)

If this view of the statute is the correct one, it would follow that neither the Bowman Act nor the Tucker Act repealed so much of § 1063 as applies to claims transmitted upon the certificate of an Auditor or Comptroller.

For various reasons it is to be hoped that the jurisdiction granted by § 1063 has been preserved, at least as to claims pending in the accounting offices, if not as to all cases. For instance, this section affords a method by which constitutional questions may be submitted to the court without bringing the executive and legislative departments of the Government into apparent conflict. The executive officers are bound like other persons to obey the law, and incidentally to take notice whether statutes are or are not constitutional; in other words, are or are not law. (*Huntington* v. *Worthen*, 120 U. S., 101;

Virginia Coupon Cases, 114 U. S., 270; Bishop on the Written Laws, § 35.) It is important, on the other hand, that they should maintain harmonious relations with the legislature. This section seems to have been drawn with a view to enabling such questions to be submitted to the arbitrament of the Supreme Court without forcing the executive to assume any position upon them until the court's decision.

For other reasons, also, it is convenient and desirable that officers of the Government should be enabled in doubtful cases to obtain a final decision from this court in the most speedy manner possible. Thus it may be desirable that different questions arising under the same statute be transmitted together, so that they may be heard and decided together.

The claim in the present case was at one time pending in the office of the Second Comptroller of the Treasury (Rec., p. 3.) No certificate of any Auditor or Comptroller is contained in the record, however. If, as a matter of fact, the claim was one which the Court of Claims had the power to adjudicate under this clause of § 1063 of the Revised Statutes, the necessary jurisdictional facts do not appear in the record.

(B) *Bowman Act.*—Two sections of the Bowman Act require attention.

Section 1 applies "whenever a claim or matter is pending before [1] any committee of the Senate [2] or House of Representatives, [3] or before either House of Congress, which involves the investigation and determination of facts." Such a claim or matter may be transmitted

to the court by "the committee or House." The court is directed not to enter judgment, but report its findings to the committee or to the House, as the case may be.

Section 2 applies "when a claim or matter is pending in any of the Executive Departments which may involve controverted questions of fact or law." Such a claim or matter may be transmitted by the head of a Department; and "the court shall not enter judgment thereon, but shall report its findings and opinions to the Department by which it was transmitted for its guidance and action." It will be noticed that this includes only the first of the two classes of cases covered by Rev. St., §§ 1063 and 1064, that it includes all controverted cases and is not restricted to the four subdivisions described in § 1063, and that it applies to every "matter" pending in any of the Departments. It is thus extended to include such cases as *In re Sanborn*, 148 U. S., 222, in which the matter pending in the Interior Department was not a claim against the United States, but a claim against the Sisseton and Wahpeton Indians, as pointed out by Mr. Justice Shiras.

Whether this section supersedes, abrogates, and impliedly repeals the corresponding portion of § 1063 is discussed in the brief annexed to the motion to dismiss heretofore filed. For reasons hereinabove stated, it would seem that it does not affect cases referred by accounting officers of the Treasury.

Whether or not it is proper to say that the first portion of § 1063 is impliedly repealed, it would seem at first sight to be substantially repealed; for there is an express prohibition against entering judgment in any claim or matter

which may involve controverted questions of fact or law, and this includes all the classes of cases which may be sent over to the Court of Claims by the head of an Executive Department as distinguished from those sent by the Secretary of the Treasury at request of an Auditor or Comptroller. It may be, however, that the prohibition against entry of judgment is subject to an implied exception as to the cases covered by § 1063. If this be so, then the present appeals must be sustained.

(C.) *The Tucker Act.* This act starts off with an enumeration of the matters which "the Court of Claims shall have jurisdiction to hear and determine" (§ 1). It then gives concurrent jurisdiction in certain cases to the district and circuit courts (§ 2). It then provides that the jurisdiction of all the courts above mentioned (if the Court of Claims is a "court of the United States") "shall be governed by the law now in force in so far as the same is applicable and not inconsistent with the provisions of this act" (§ 4). It gives either party the same "rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained" (§ 9).

The latter provision relates only to a "suit." It was said by this court *In re Sanborn, supra,* that the word "suit" is not applicable to a case transmitted from a Department under that act.

Section 12 contains a provision for Departmental references which is almost identical with the corresponding provision of the Bowman Act, *supra.* It differs in three

respects: First, that the consent of the claimant is required; second, that the prohibition against entering judgment is omitted; third, that the words "for its guidance and action," at the end of the paragraph, are omitted.

The first of these changes is evidently made in order to protect claimants from being forced into the Court of Claims with cases that they may prefer to bring in the circuit or district court. This change shows very clearly that the section under consideration was intended to repeal the corresponding section of the Bowman Act. The omission of the final clause was intended evidently to make the functions of the Court of Claims "ancillary and advisory only." (*In re Sanborn, supra*, at p. 226.)

The repeal of the prohibition against entering judgment might perhaps have the effect of restoring § 1063 in all respects were it not for the provision of § 12 of the Revised Statutes, that "whenever an act is repealed which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided." In view of this provision, the Tucker Act can not be considered as restoring the right to enter judgment, except so far as that right is given by § 13.

The provision of § 1 of the Bowman Act for references by committees is not repealed in any form, and therefore may be regarded as still standing. The right of either House to refer bills to the Court of Claims is given in terms by § 14 of the Tucker Act, which section provides that the court shall "report to such House the facts in the case and the amount, where the sum can be liqui-

dated, including any facts bearing upon the question whether there has been any delay or *laches*," etc. This section contains no prohibition against the entry of judgment.

Section 13 of the Tucker Act is very peculiar in form. It provides as follows:

> That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of [the Bowman Act], if it shall appear to the satisfaction of the court upon the facts established *that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act*, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court.

Apparently this was intended to mean that the Court of Claims may render judgment in any departmental or Congressional case (not in a committee reference) when the matter transmitted is a claim against the United States of the character described in the first section of the Tucker Act. There is, therefore, much force in Senator Hill's suggestion that the second comma in § 13 is inserted by mistake, and should be disregarded. If this be correct, then the report of the conference committee, referred to in the brief annexed to the motion to dismiss herein, gave the House erroneous information as to what the bill really meant.

The question how far the Court of Claims has the right, by virtue of § 13 of the Tucker Act, to enter judgment

upon a departmental or a Congressional reference is, however, immaterial in the present case, because this reference concerns a claim more than six years old, and which, therefore, under the final clause of § 1 of the act, can not be made the subject of a suit. It is well settled that the limitation thus fixed is not in the nature of statutes of limitation in general, but is a condition upon jurisdiction. A case more than six years old is not one in which the court has "jurisdiction to render judgment." (*De Arnaud* v. *United States*, 151 U. S., 483, 495.)

It would seem, therefore, that the entry of judgment in the present case is unauthorized and void, for the reason that the record contains no certificate of an Auditor or Comptroller under § 1063 of the Revised Statutes. If, as would appear possible from a statement in claimant's petition (Rec., p. 3), the case is one still actually pending in the office of the Comptroller of the Treasury, it may yet be sent over with a proper certificate, and come up to this court for decision under the Revised Statutes.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.
J. E. DODGE,
Assistant Attorney General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, *Appellant*,
vs.
THE STATE OF NEW YORK. } No. 45.

THE STATE OF NEW YORK, *Appellant*,
vs.
THE UNITED STATES. } No. 136.

Motion to Modify and Correct the Judgment.

Comes now the attorney for the State of New York in the two appeals in the above-entitled cause and moves to modify and correct the decision therein made on January 6, 1896, so that instead of reversing the judgment appealed from the same shall be modified by adding thereto the sum of $39,867.18 and affirming the same as so modified or such other relief as the State of New York may be entitled to in the premises. Such motion will be made upon the transcript of the record on said appeals, the opinion and decision of the court therein, the mandate, and an affidavit of the attorney for the State of New York, verified February 14, 1896.

DAVID B. HILL,
Attorney for the State of New York.

Affidavit.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, *Appellant*, *vs.* THE STATE OF NEW YORK. } No. 45.

THE STATE OF NEW YORK, *Appellant*, *vs.* THE UNITED STATES. } No. 136.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

David B. Hill, being duly sworn, deposes and says that he is the attorney for the State of New York on the two appeals in the above cause, and resides at Albany, New York.

And deponent further says that the judgment appealed from herein was rendered by the Court of Claims and entered therein on June 9th, 1891, for the sum of $91,320.84, in favor of the State of New York, and that a transcript of the said judgment was duly filed in the Treasury Department on the 19th day of July, 1892, and the interest on such judgment at four per cent. from said date until the date of the mandate herein, to wit, February 3, 1896, amounts to the sum of $12,926.97, which, as deponent is advised, will be lost to the State of New York unless the decision herein shall be modified by affirming instead of reversing the said judgment, and then adding thereto the further sum of $39,867.18, in accordance with the opinion and decision of this Court, made on January 6, 1896.

And deponent further says that the mandate herein was dated or issued on February 3, 1896, but has not yet been presented to or filed in the Court of Claims, but is still in the possession of the clerk of this Court.

DAVID B. HILL.

Subscribed and sworn to before me February 14, 1896.

[SEAL.] R. B. NIXON,
Notary Public.

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, *Appellant*,
vs.
THE STATE OF NEW YORK. } No. 45.

THE STATE OF NEW YORK, *Appellant*,
vs.
THE UNITED STATES. } No. 136.

BRIEF ON MOTION.

DAVID B. HILL,
Attorney for the State of New York.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

THE UNITED STATES, *Appellant*,
vs.
THE STATE OF NEW YORK. } No. 45.

THE STATE OF NEW YORK, *Appellant*,
vs.
THE UNITED STATES. } No. 136.

BRIEF ON MOTION.

The facts are these: On June 9, 1891, the Court of Claims on a claim filed for $131,188.02 rendered a judgment in favor of the State of New York for $91,320.84 and disallowed the balance of the claim, to wit, $39,867.18.

On August 8, 1891, the United States appealed from such judgment to this Court. On August 13, 1891, the State of New York appealed therefrom. (*See page 26 of Record.*)

On the 19th day of July, 1892, a transcript of said judgment was duly filed in the Treasury Department (*see Hill's affidavit in moving papers*). The cross-appeals were subsequently argued, and on January 6 last this Court decided the same, holding that the State of New York was entitled to the amount actually recovered and also the additional sum of $39,867.18, but nevertheless directed that the original judgment be *reversed*.

The conclusion of the opinion was as follows: "As the State was entitled to a larger sum than $91,320.84, the judgment is *reversed* and the cause is remanded with directions for further proceedings not inconsistent with this opinion." The mandate herein was signed or issued on February 3 last, but has never been filed in the Court of Claims, but is still in the possession of the clerk of this Court.

The State of New York now moves to correct the decision, so that, instead of *reversing* the original judgment, it shall *affirm* the same and direct an addition thereto of the sum of $39,867.18, or for such other relief to which the State may be entitled in the premises.

First.

The object of the motion is to enable the State to be in a position to claim interest from the Treasury Department upon the original judgment of $91,320.84 from the date when the transcript thereof was filed in the Treasury Department, to wit, July 19, 1892, to the date of the issuing of the mandate herein.

The interest amounts to $12,926.97.

The statute which now governs the allowance of interest upon judgments of the Court of Claims appealed to this Court was passed on September 30, 1890, superseding § 1090 of the Revised Statutes.

It is as follows:

"And on judgments in favor of claimants which have been appealed by the United States and affirmed by the Supreme Court, interest at the rate of four per cent. per annum shall be allowed and paid from the date of filing the transcript of judgment in the Treasury Department up to and including the date of the mandate of affirmance by the Supreme Court."

(*Supplement to the R. S., vol. 1, 2nd ed., page 811, being chap. 1126, Laws of 1890.*)

If the judgment appealed from had been *affirmed* instead of *reversed*, then it must be admitted that the State would be entitled to be allowed such interest by the Treasury Department under the said statute. But the decision cuts off such right of the State.

It is respectfully submitted that the judgment is approved, sustained, and *virtually* affirmed in the *opinion* of the court.

It is held that the State properly recovered the sum actually awarded, to wit, $91,320.84, and should have recovered $39,867.18 more. (*See opinion.*)

From such premises it would seem to have followed that the judgment should not have been *reversed*, but should have been *affirmed* and then increased to the proper amount.

Such a decision would have insured equal and exact justice.

Unquestionably the Court would have so decided had its attention been particularly called to the question of interest or to the injurious effect of an absolute reversal. The error or inadvertence is merely in the *form* of the decision, which can be corrected on motion.

Such a correction changes nothing which in fact was intended to be decided.

(*a.*)

Under the circumstances, an affirmance of the judgment is appropriate, with a direction for an increase of its amount in accordance with the opinion.

We are not asking this Court nor the Court of Claims to *expressly* or *directly* allow interest. Neither Court has any power in the premises. That is a matter to be determined and regulated by the statute of 1890, and is a matter between the claimant and the Treasury Department when the judgment comes to be paid. We ask simply that the *form*

of the judgment of this Court shall not be such as to preclude the receiving of interest on the original judgment; and an *affirmance* is absolutely necessary for that purpose.

(*b.*)

This Court frequently affirms judgments, even though a *reduction* in their amount is ordered.

In the case of *United States vs. Pitman, 147 U. S. R., 672,* the judgment was affirmed, although a slight reduction was directed in the judgment appealed from. The conclusion of the opinion was, "This deduction being made, the judgment of the court below is affirmed."

In the case of *United States vs. Barber, 140 U. S. R., 168,* the judgment was affirmed, although a reduction was made. The conclusion of the opinion was as follows: "These embrace all the items to which objection is made by the Attorney General. It remains that upon being *modified* by deducting the last item of $18.80 the judgment of the court below must be affirmed."

If under such circumstances formal judgments of affirmance are properly directed, although they are reduced rather than increased, there is much more reason why a judgment should be formally affirmed where it is held by the court in its opinion that the judgment should have been for a much larger amount.

Of course, so far as a recovery by the State of the full principal sum to which the court holds the State is entitled, to wit, the sum of $131,188.02, the mere *form* of the decision, whether it is one of affirmance or reversal, is immaterial, because the Court of Claims is authorized now to render judgment for said principal sum; but it is important as bearing upon the question of interest under the statute of 1890 cited above.

This Court certainly did not intend arbitrarily to deprive

the State of the usual interest, which the statute contemplates shall be allowed in such cases where the claimant's contention has been held to be right, and, having inadvertently done so in the decision already made, will now correct the *form* thereof so that the State may be placed in a position to claim interest from the Treasury Department. We should not be foreclosed or cut off by the form of the decision.

In the case of *Hobbs vs. The United States, 19th Court of Claims Reports, page 225*, there appears an extract from the mandate which the Supreme Court had granted in that case, which is as follows:

"It is now here ordered and adjudged by this Court that the judgment of the said Court of Claims in this cause be, and the same is hereby, affirmed for the full amount of the award made to the claimant, and that an additional amount of $2,660 should be allowed for the two items of extra expense referred to in the opinion of this Court."

It is suggested that the mandate in this case should substantially follow that form.

See also the conclusion in the case of *Harvey vs. The United States, 113 U. S. R., 249.*

The application should be granted.

DAVID B. HILL,
Attorney for the State of New York.